This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

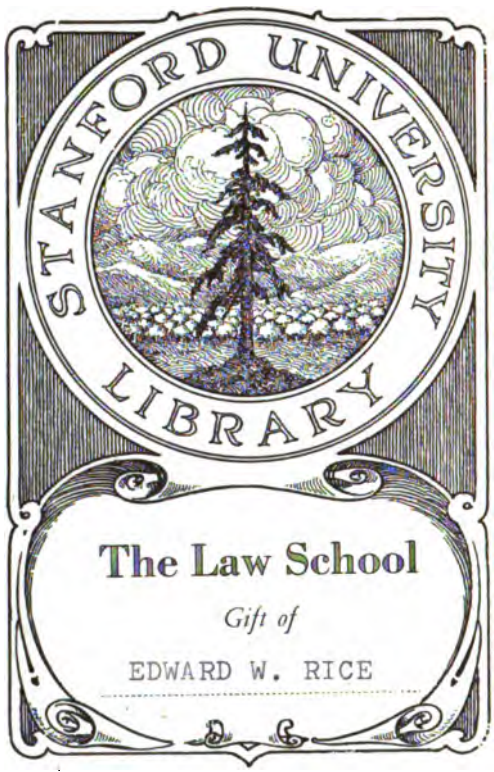
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

12/6

STANFORD UNIVERSITY
LIBRARY
The Law School
Gift of
EDWARD W. RICE

12/6


STANFORD UNIVERSITY
LIBRARY
The Law School
Gift of
EDWARD W. RICE

LBC
LBG
VJta

LAW OF ARBITRATION

IN SCOTLAND.

TREATISE

ON

THE LAW OF ARBITRATION IN SCOTLAND.

BY

JOHN MONTGOMERIE BELL, ESQ.
ADVOCATE.

SECOND EDITION.

WITH AN APPENDIX OF FORMS.

EDINBURGH:
T. & T. CLARK, LAW BOOKSELLERS, GEORGE STREET.
LONDON: STEVENS AND SONS, AND STEVENS AND HAYNES.
1877.

PRINTED BY T. AND A. CONSTABLE, PRINTERS TO HER MAJESTY,
AT THE EDINBURGH UNIVERSITY PRESS.

NOTE TO SECOND EDITION.

THIS Edition, which has had the benefit of a few final additions and corrections by the late Author, has been revised, and the law brought down to date, by Mr. JOHN KIRKPATRICK, Advocate, the new matter inserted by whom is denoted by square brackets. The Appendix has also undergone careful revision. M. M. B.

22 MANOR PLACE, EDINBURGH,
1st *October* 1877.

PREFATORY NOTE TO FIRST EDITION.

It is the object of the following Treatise to present, in a systematic form, the principal decisions in the law of Arbitration, accompanied with such excerpts from Judicial Opinions as may serve to illustrate the leading doctrines of that branch of Scottish Municipal Jurisprudence. It seemed that, in this manner, an interesting department of the law might be elucidated, by collecting the authoritative instruction which has, from time to time, been given from the Bench, and stating it, to a large extent, in the same words in which it was originally delivered.

In following out this design, some incidental discussion has been occasionally invited, by topics possessing especial interest in arbitration law; but this, it is hoped, has not been carried to an inconvenient length.

As Arbitration is so largely resorted to by the various classes of the community, it has been kept in view to give such explanation of any technical details, as may render them easily intelligible to non-professional Arbiters.

The only work which has hitherto appeared in Scotland exclusively applicable to Arbitration, is that of the late John Parker, Esq., Principal Extractor of the Court of Session, whose "Notes on the Law of Arbitration" have passed through two editions. The labours of Mr. Parker evince much research and ability; but the last edition of his book was published in 1845, since which time many important and instructive cases have occurred. Besides, there are some topics in arbitration law which were only touched on with much brevity by Mr. Parker. It therefore appeared that useful professional service might now be rendered, by making a methodical digest of the law on the subject of Arbitration.

The hope of attaining, in some measure, to this end, has induced the preparation of the present Treatise.

CONTENTS.

PAGE

ABBREVIATIONS AND REFERENCES, . . . xiv

INDEX OF CASES, ... xv

INTRODUCTION, ... 1

PLAN OF THE TREATISE, ... 17

BOOK I.

THE CONTRACT OF SUBMISSION, ... 19

CHAP.

I. The Nature and Object of the Contract of Submission, viewed as at common law, independently of the 25th Enactment of the Articles of Regulation 1695, . 19

II. The 25th Enactment of the Articles of Regulation 1695, 31

III. The Constitution of the Contract of Submission, . . 44

IV. The Construction of the Contract of Submission; more especially with regard (1) to the most common styles of the contract; and (2) to the scope and application of the submission-clause, used as ancillary to another and primary contract, ... 57

V. The peculiar Rule, in Arbitration Law, which prevents the enforcement of an agreement to submit, unless the arbiters be named in the agreement; and the limitations of that Rule, ... 85

BOOK II.

PAGE

THE PARTIES TO THE CONTRACT OF SUBMISSION, AND THE SUBJECT-MATTERS WHICH MAY BE COMPETENTLY SUBMITTED TO ARBITRATION, 97

CHAP.

I. The Parties to the Contract of Submission, . . . 97

II. What subjects may be competently submitted to Arbitration, ... 120

BOOK III.

ARBITERS AND OVERSMEN; THEIR RESPECTIVE POWERS AND DUTIES IN THE CONDUCT OF A SUBMISSION, ... 127

CHAP.

I. Who may be Arbiters or Oversmen, ... 127

II. Implied powers of Arbiters, ... 139

III. Powers and Duties of Arbiter in leading Proof, . . 142

IV. Powers and Duties of Arbiter in hearing Parties, . 163

V. Powers and Duties of Arbiter in regulating Process under a Submission, ... 172

VI. Power of Prorogation of the Submission, . . . 176

VII. Power of Devolution of the Submission, ... 185

VIII. Power of Arbiter, in regard to the Renunciation of his Office, ... 201

IX. Power of Arbiter to alter his Award while undelivered, ... 210

X. Duty of Arbiter to Exhaust the Submission, . . 214

XI. Power of Arbiter to Remit to Men of Skill, . . 223

XII. Power of Arbiter over the Expenses of Process, . 228

XIII. Power of Arbiter in dealing with Penalties, . . 233

XIV. Powers and Duties of Oversman, ... 235

BOOK IV.

PAGE

THE AWARD, OR DECREE-ARBITRAL, ... 239

BOOK V.

THE JUDICIAL REFERENCE, ... 267

BOOK VI.

SUBJECTS IN ARBITRATION LAW WHICH HAVE NOT BEEN CONSIDERED IN THE FIVE PRECEDING BOOKS, ... 289

CHAP.

I. The Clerk to the Submission, ... 289
II. Duration of the Submission, ... 294
III. Effect of the Submission upon the Plea of Prescription, ... 305
IV. Remuneration of the Arbiter, ... 312
V. Effect of Homologation upon Arbitration Procedure, . 319
VI. Grounds of Challenge of an Award, ... 327
VII. Evidence admissible in Reducing or Defending an Award, ... 337
VIII. Subsequent use of Proof which has been led in an expired Submission between the same Parties, . 348
IX. Procedure requisite for enforcing the Attendance of Witnesses before the Arbiter, ... 353
X. Use of Action or Diligence upon an Award, . . 357
XI. Stamps requisite in Arbitration Procedure, . . 364
XII. Non-concurrence among Arbiters, ... 371
XIII. Statutory Arbitration, ... 374
XIV. Foreign Award, ... 394

APPENDIX.

NO.		PAGE
I.	Example of a common form of General Submission to a sole Arbiter,	403
II.	Examples of some Variations on the above style, which are of frequent occurrence,	404
III.	General Submission of mutual claims to two Arbiters, and to an Oversman named in the Submission,	406
	Variations,	408
IV.	Example of a common form of Special Submission to a sole Arbiter,	409
V.	Example of Submission of a depending Action to a sole Arbiter,	410
VI.	Example of a General Special Submission to a sole Arbiter,	411
VII.	Form of Acceptance of the office of Arbiter,	412
VIII.	Appointment of the Clerk to the Submission, and Order for Claims,	412
IX.	Order where the Arbiter thinks it expedient to proceed upon a Closed Record,	413
X.	Order for Hearing,	414
XI.	Order allowing a Proof,	414
XII.	Petition for Warrant to Cite Witnesses and Havers,	414
XIII.	Terms of Oath to be administered to a Witness,	415
XIV.	Petition to the Sheriff, where a Witness or Haver refuses to answer, or to produce,	415
XV.	Petition to the Court of Session, for Warrant to Cite Havers in England, to depone before a Commissioner named by an Arbiter,	417
XVI.	Form of taking Proof on Commission,	418
XVII.	Petition to the Sheriff against a Party who disobeys the Arbiter's order to return documents which he has borrowed up,	420
XVIII.	Joint Minute of Judicial Reference,	421
XIX.	Report to the Court by Judicial Referee,	422

NO. PAGE

XX. Form of a Prorogation, written on the Deed of Submission, ... 422

XXI. Prorogation of a Submission made by the Parties-submitters, ... 423

XXII. Minute of Nomination of an Oversman indorsed on the Submission, ... 423

XXIII. Minute of Devolution upon an Oversman already appointed, ... 424

Variations, ... 424

XXIV. Minute sisting new Party in a Submission, . . 425

XXV. Minute sisting the Representative of a deceased Party, ... 425

XXVI. Example of a Decree-Arbitral by a sole Arbiter, . 425

XXVII. Arbitration Clauses of the Companies Clauses Consolidation (Scotland) Act, 8 & 9 Vict., c. 17, 427

XXVIII. Arbitration Clauses of the Lands Clauses Consolidation (Scotland) Act, 8 & 9 Vict., c. 19, . 428

XXIX. Arbitration Clauses of the Railways Clauses Consolidation (Scotland) Act, 8 & 9 Vict., c. 33, 431

XXX. Arbitration Clause of 13 & 14 Vict., c. 36; an Act to facilitate Procedure in the Court of Session, ... 434

XXXI. Suggestion as to the further use of the Arbiter's power of imposing penalties in a Submission, 434

XXXII. Example of a Submission given by Dallas, . 435

INDEX, ... 441

ABBREVIATIONS AND REFERENCES.

WITH respect to the Abbreviations which have been employed in making references to authorities, they are generally such as are in ordinary use. It seems only requisite to explain that, in quoting cases from Morison's Dictionary of Decisions, the reference is made by merely adding the number of the *page*, in parentheses, to the case. Thus, Thomson, June 1, 1740 (430, or 16050), indicates that the case will be found either at p. 430 or at p. 16050 of the Dictionary. When the case occurs in an *Appendix* to one of the Titles in the Dictionary, the reference is made by quoting the *Title*, with the words "Dicty. Appx.," and the number of the case subjoined.

The First Series of Decisions of the Court of Session, consisting of sixteen volumes, and extending from 1821 to 1838, is referred to by the letter S,—the initial letter of the name of Mr. Patrick Shaw, advocate. The Second Series of Decisions, in continuation of the first, is referred to by the letter D,—the initial letter of the name of Mr. Murray Dunlop, advocate. [The Third and Fourth Series, edited respectively by Mr. N. Macpherson and Mr. M. Rettie, advocates, are referred to by the contractions Macph. and R.] It may be observed that, in quoting from the first five volumes of the First Series, the edition of 1834 has been used, as it contains the fullest note of Judicial Opinions. But the date of the case will indicate its place in the earlier editions.

The references to the Reports in the Scottish Jurist will be found in the List of Cases prefixed to the Treatise; the number of the volume and page of each case being quoted in parentheses, immediately after the names of the parties.

The cases stated in the excerpts from the Note-book of the late Lord Justice-General Boyle, which are contained in Mr. Parker's Synopsis, annexed to his Notes on the Law of Arbitration, are quoted as from "Park. Syn.," with the addition of the number of the page of the Synopsis, and the number of the case.

The treatise of Mr. Russell, on "The Power and Duty of an Arbitrator," etc., in the law of England, is quoted by the abbreviation "Russ.," and the page [of the second edition, to which the page of the fourth edition is now added].

The words "Sess. Pap." refer to the Collection of Session Papers in the Advocates' Library, relative to the cases contained in the published Reports; unless when described as belonging to a particular series of papers.

INDEX OF CASES.

(The numbers in parentheses refer to vol. and page of the Scottish Jurist.)

A. *v.* B., 1584, ... PAGE 54, 56
A. *v.* B., 1617, ... 45
A. *v.* B., 1746, ... 53
Abbott and Son *v.* Skelton, ... 337
Aberdeen, Earl of, Forbes *v.* 244
Aberdeen Market Co., Morrison *v.* (19, 696), ... 34
Aberdeen Ry. Co. *v.* Blaikies (23, 237), (24, 537), (26, 220), (26, 622), 56, 82, 85, 151
Aberdeen Ry. Co., Anderson *v.* (22, 335), ... 75, 151, 290
Aberdeen Ry. Co., Blaikies *v.* (24, 288), (23, 615), . . . 354, 355
Abernethy, Gordon *v.* 194, 245
[Adam, MacCord *v.* (34, 41)], ... 72, 78, 85
Adams, Hutton *v.* (2, 277), ... 55
Advocate, Lord, Farquharson *v.* 294
Advocate, Lord, Hay *v.* 306
Aikenhead *v.* Aikenhead, ... 105
[Alexander *v.* Bridge of Allan Water Co. (41, 258)], . . . 58, 249
Alison, Clyne's Trustees *v.* (12, 333), ... 229
Alison, Ferrier *v.* (15, 227), ... 143, 228, 232
Allardes *v.* Morison, ... 234
Alston *v.* Chappell (12, 247), ... 143
Anderson *v.* Aberdeen Ry. Co. (22, 335), ... 75, 151, 290
Anderson *v.* Buchanan, ... 100
Anderson *v.* Coxeter, ... 8
Anderson *v.* Kinloch (8, 221), ... 230, 234
Anderson *v.* Pott (5, 73), ... 278
Anderson *v.* Wallace, ... 154
Anderson *v.* Wood, ... 114, 284
Anderson, Mag. of Edinburgh *v.* 124
Anning *v.* Hartley, ... 240
Arnott, Farrell *v.* (29, 463), ... 303
Arthur *v.* Callin, ... 223, 338
Avery, Scott *v.* 32
Aytoun *v.* Scot, ... 105, 109
Aytoun, Deas *v.* 28

Baillie *v.* Pollock (1, 181), ... 49, 111, 245
Baillie, Hood *v.* (5, 159), ... 60, 231
Baird *v.* Officer (4, 197), ... 120
Bairdner *v.* Drysdale, ... 234

Balfour, Bonar *v.* . . . . . PAGE 241
Balhagartis *v.* Glenkindy, ... 267
Banff, L. Ruthven *v.* 319
Banks, Low *v.* (8, 387), ... 155, 340
Banks, Smith *v.* (2, 474), ... 47, 228, 270
[Bannatyne *v.* Gibson and Clark (35, 56)], ... 210, 213
Barbour *v.* Wight, ... 114, 300
Barcklay *v.* Foord, ... 53
Bargaddie Coal Co. *v.* Wark (31, 323), ... 57
Barr *v.* Macnaughton (25, 18), ... 159, 174
Barr and Co., N. Brit. Ry. Co. *v.* (28, 34), ... 50, 59, 249
Bartholomew, Potter *v.* (20, 18), ... 270, 286
Baxter *v.* Macarthur, ... 171, 230, 278, 316
Beadie *v.* Carr (22, 469), ... 229
Beattie *v.* Dundee, ... 49
Bell *v.* Halliday, ... 66, 250
Bell, Telfer and Co. *v.* 189, 191
Berry *v.* Watson, ... 143, 151, 160
Bickerdyke, Sharpe *v.* 24, 170, 340
[Binning, Cox Brothers *v.* (40, 93)], ... 155, 249, 329, 333, 336
Bird, Tunno *v.* 188
[Birrell *v.* MacCulloch and Fyfe (39, 48)], ... 47, 75
Bisset, Macleod *v.* 226
Black, Livingstone *v.* 333
Black, Macfarlane *v.* (14, 533), ... 226, 293
Blaikies *v.* Aberdeen Ry. Co. (24, 288), (23, 615), . . . 354, 355
Blaikies, Aberdeen Ry. Co. *v.* (23, 237), (24, 537), (26, 220),
(26, 622), ... 58, 82, 85, 151
Blain *v.* Crawford, ... 330, 331
Blair *v.* Gibb, ... 314, 329
Blantyre (Prior of), Sillartonhill *v.* 49
Bonar *v.* Balfour, ... 241
Borthwick, Torbet *v.* (21, 231), ... 229
Boswell *v.* Lindsay, ... 49, 304
Boswell, Macanqual *v.* 299
Boyd *v.* Emmerson, ... 48
Brakenrig *v.* Menzies (14, 109), ... 268, 277, 278, 283
Breadalbane, E. of, Paterson *v.* 312
Bremner, Kerr *v.* 257
[Bremner and Elder, Elgin Lunacy Board *v.*], . . . 32, 45, 241, 320
[Bridge of Allan Water Co., Alexander *v.* (41, 258)], . . . 58, 249
Broomfield *v.* Young, ... 234
Brown *v.* Gardner, ... 46, 233, 326
Brown *v.* Heriot, ... 337, 339
Brown *v.* Scoular, ... 111
Brown, Gilfillan *v.* (5, 597), ... 119
Brown, Gray *v.* (5, 216), ... 222, 253
Brown, Lang *v.* (25, 37), (26, 369), ... 200, 240
Brown, Merry and Cunningham *v.* (31, 733), (32, 528), . 51, 92, 186, 305
Brown, Robertson *v.* (9, 117), ... 228
Bruce, Duncan *v.* 244
Brunton's Trustees, Douglas *v.* (8, 374), ... 113
Bryson *v.* Mitchell, ... 133, 189, 304
Buchanan *v.* Muirhead, ... 32

Buchanan, Anderson *v.* . . . . . PAGE 100
[Burnet *v.* Henry], ... 377
Burns, Watmore *v.* (11, 444), (14, 57), ... 282
Bury, Sharp *v.* 333

Cable, Mitchell *v.* (20, 476), ... 37, 152, 175
[Caird (37, 443)], ... 354
Cairncross *v.* Hunter, ... 205
Calder *v.* Gordon (9, 242), ... 28
Calder *v.* Mackay (32, 301), ... 58
Calder, Campbell *v.* 241
Calder, Mackenzie *v.* 60, 248
Calderwood, Chiesly *v.* 205
[Caledonian Railway Co. *v.* Greenock and Wemyss Bay Railway Co. (44, 134, 503)], ... 58, 78, 85
Caledonian Railway Co. *v.* Lockhart (22, 89), (32, 468), . . 224, 384
Caledonian Railway Co., Laing *v.* (19, 14), (22, 135), . . . 382
Caledonian Railway Co., Younger *v.* (20, 34), ... 232
Callin, Arthur *v.* 223, 338
[Cameron *v.* Menzies (40, 249)], ... 41, 251
Campbell *v.* Calder, ... 241
Campbell *v.* Campbell (15, 279), ... 156, 275
Campbell *v.* Dougal, ... 57
Campbell *v.* Henderson, ... 197
Campbell *v.* Macfarlane (7, 314), ... 20
[Campbell *v.* MacHolm (36, 121)], ... 39, 41, 158
Campbell *v.* Maule, ... 337
Campbell *v.* Mitchell, ... 240
[Campbell *v.* Shaws Water Co. (36, 564)], ... 91
Campbell, Dixons *v.* (2, 500), ... 93, 305
Campbell, Finlay and Co. *v.* (6, 444), ... 65, 217
Campbell, Rivers, and Co., Crawford *v.* 66
Carlyle, Hetherington *v.* 331
Carmichael, Monteith *v.* 299
Carr, Beadie *v.* 229
Carrick, Montgomerie *v.* (20, 504), (22, 79), . . . 79, 177, 304
Carruthers *v.* Hall (3, 36), ... 70
Cassell, ... 188
Cassillis, E. of, Lochinvar *v.* 262
Chalmers, Middleton *v.* 191
Chapman and Son *v.* Edinr. Prison Board (16, 563), . . . 46
Chappell, Alston *v.* (12, 247), ... 143
Cheape, Johnston *v.* 132, 149, 297
Chelmsford, L., Swinfen *v.* 120
Cheyne, Robertson *v.* (19, 224), ... 299, 302
Chiesly *v.* Calderwood, ... 205
Christie, Dunsmoor *v.* 196, 245
Churnside *v.* Currie, ... 99
Clark, Mackenzie *v.* 136, 138, 329
Claud Girdwood and Co., Grant *v.* 114, 144, 303
Clephane, Robertson *v.* 34
Clerk, Kerr *v.* 50
Clydesdale, M. of, *v.* E. of Dundonald, ... 110
Clyne's Trustees *v.* Alison (12, 333), ... 229

Clyne's Trustees, Edinr. Oil Gas Co. *v.* (4, 576), (7, 207), (8, 9), . PAGE 253, 316
Cochrane *v.* Guthrie (31, 205), (33, 430), ... 51, 321, 333
Cockburn *v.* Edward, ... 298
[Colinton Friendly Society, Davie *v.* (43, 54)], ... 78
Colquhoun *v.* Corbet, ... 194, 339
Colquhoun *v.* Haig, ... 274, 278
Colquhoun, Fisher *v.* (16, 542), ... 137
[Connel, Walls *v.* (34, 535)], ... 336
Cook *v.* Mowbray, ... 125
Cooper *v.* Stuart, ... 234
Corbet, Colquhoun *v.* 194, 399
Corson, petitioner (7, 501), ... 113
[Cox Brothers *v.* Binning (40, 93)], ... 155, 249, 329, 333, 336
Coxeter, Anderson *v.* 8
Craigie, Mackenzie *v.* 234
Craigie, Runciman *v.* (3, 445), ... 199
Cramond, Jack *v.* 314, 329
Crawford *v.* Campbell, Rivers, and Co., ... 66
Crawford *v.* Hamilton, ... 248
Crawford *v.* Paterson (30, 263), ... 191, 237
Crawford, Blain *v.* 330, 331
Crawford, Rowan *v.* 213
Croskey and Co., Europ. and Amer. Steam Shipp. Co. *v.* . . . 188
Cuninghame *v.* Dunlop (9, 160), ... 252
Cuninghame *v.* Whitefoord, ... 110
Cunningham *v.* Drummond, ... 295
Cunningham, Grosat *v.* 233, 249
Currie, Churnside *v.* 99
Cuthbertson, Woodside *v.* (20, 192), ... 119

Dale, Vere *v.* 105
Dalgairns' Trustees, Kirkaldy *v.* 31, 143, 160, 178
Dalgetie *v.* Ury, ... 251
Dalgleish *v.* Johnston, ... 28, 328
Davidson *v.* Oswald, ... 85
Davidson *v.* Town of Edinburgh, ... 338
Davidson, Robertson *v.* (5, 390), ... 277
[Davie *v.* Friendly Society of Colinton (43, 54)], ... 78
Deas *v.* Aytoun, ... 28
Dennie, Tenants of, *v.* Fleming, ... 20
Dewar, Ewing and Co. *v.* 180, 300
[Dickson *v.* Grant (42, 264)], ... 131, 136
Dickson *v.* Shirreff (3, 55), ... 363
Dickson, Mowbray *v.* (20, 405), ... 145, 289
Diffors, Orme *v.* (6, 114), ... 99
Dinwiddie, Williamson *v.* 56
Dixon *v.* Monkland Canal Co., ... 271
Dixons *v.* Campbell (2, 500), ... 93, 305
Donaldson *v.* Donaldson, ... 177
Dougal, Campbell *v.* 57
Douglas *v.* Brunton's Trustees (8, 374), ... 113
Douglas, Oliphant *v.* 244
Doull, Manson *v.* (12, 491), ... 393
Drew *v.* Drew (27, 273), ... 29, 133, 303

Drew, Mackessok *v.* . . . . . PAGE 266, 295
Drummond *v.* Leslie, ... 317, 281
Drummond, Cunningham *v.* 295
Drummond, Pitcairn *v.* 65
Drysdale, Bairdner *v.* 234
Dudgeon *v.* Roberton (31, 193), ... 309
Duffus, L., *v.* Petrie, ... 254
[Dumbarton Waterworks Comrs., Tough *v.* (45, 162)], . . 58, 78, 85
Duncan *v.* Bruce, ... 244
Duncan, Gowans *v.* (31, 228), ... 184, 189, 327
Dundee, Beattie *v.* 49
Dundee, P., and A. Ry. Co. *v.* Richardson (23, 246), . . 241, 327
Dundonald, E. of, M. of Clydesdale *v.* 110
Dunlop *v.* Ralston, ... 313
Dunlop, Cuninghame *v.* (9, 160), ... 252
Dunmore, E. of, *v.* Macinturner (7, 174), ... 24, 157, 179
Dunn *v.* Lamb (26, 494), ... 307, 309, 312
Dunsmoor *v.* Christie, ... 196, 245
[Dykes *v.* Roy (41, 208)], ... 45, 240
Dysart, Mag. of, *v.* E. of Rosslyn (5, 117), ... 116, 120

Eddie *v.* Monkland Ry. Co. (27, 536), ... 308
Edinburgh, Mag. of, *v.* Anderson, ... 124
Edinburgh, Mag. of, Milne *v.* 78, 85, 89
Edinburgh (Town of), Davidson *v.* 338
Edinburgh Water Co., Forbes *v.* (2, 200), ... 327
Edinr. and Dalk. Ry. Co., Wauchope *v.* (18, 447), ... 66
Edinr. and Glasg. Ry. Co. *v.* Hill (12, 307), ... 42, 263
Edinr. and Glasg. Ry. Co., Marshall *v.* (25, 349), ... 204
Edinr. and Glasg. Ry. Co., Phipps *v.* (15, 387), ... 20, 131
Edinr. and Glasg. Ry. Co., Stirling and Dunf. Ry. Co. *v.* (28, 619), . 49
Edinr. Oil Gas Co. *v.* Clyne's Trustees (4, 576), (7, 207), (8, 9), . 253, 316
Edinr. Prison Board, Chapman and Son *v.* (16, 563), . . . 46
Edward, Cockburn *v.* 298
Eglinton, E. of, Hay *v.* 49
Elgin, E. of, Halkett *v.* 177, 304
[Elgin Lunacy Board *v.* Bremner and Elder], . . 32, 45, 241, 320
Elliot *v.* Elliot, ... 135
Elliot *v.* S. Devon Ry. Co., ... 133
Elphinston, L., *v.* Ord, ... 262
Elphinston, Ledingham *v.* (32, 102), ... 39, 142
Elphinston, L., Napier *v.* 317
Emmerson, Boyd *v.* 48
Errol, E. of, Gordon *v.* 128
Europ. and Amer. Steam Ship. Co. *v.* Croskey and Co., . . . 188
Ewing and Co. *v.* Dewar, ... 180, 300
Ewing *v.* Lawrie, ... 74
Ewing, Gardner *v.* 190, 320

Fairley *v.* MacGown (8, 233), ... 270, 321
Falconer *v.* Thomson, ... 105, 111
Falconer, Lyle *v.* (15, 74), ... 216, 314
Falconer, Wishart *v.* 56, 214
Falhouse (Feuars of), Livingston *v.* 55

Farquharson *v.* L. Advocate, ... PAGE 294
Farrar, Stonehewer *v.* 239
Farrell *v.* Arnott (29, 463), ... 303
Fergus, Millie or Whyte *v.* 206, 226
Ferguson *v.* King, ... 66, 106
Ferrie *v.* Mitchell, ... 53, 55
Ferrier *v.* Alison (15, 227), ... 143, 228, 232
Fife's Trustees, Earl of, Smith *v.* (15, 345), ... 85, 92
Finlay, Whitehead *v.* (6, 60), ... 229, 248
Finlay, Woddrop *v.* 251
Finlay and Co. *v.* Campbell (6, 444), ... 65, 217
Finlayson *v.* Finlayson, ... 105
Fisher *v.* Colquhoun (16, 542), ... 137
Fleming *v.* Wilson, ... 48, 298, 325
Fleming, Tenants of Dennie *v.* 20
Foord, Barcklay *v.* 53
Forbes *v.* E. of Aberdeen, ... 244
Forbes *v.* Edinburgh Water Co. (2, 200), ... 327
Forrester *v.* Gourlay, ... 240
Forret, Paterson *v.* 61
Fraser *v.* Gordon (6, 485), ... 303, 313
Fraser *v.* L. Lovat, ... 21, 48
Fraser *v.* Williamson, ... 54
Fraser *v.* Wright (10, 444), ... 315
Fraser, Gordon *v.* (7, 404), ... 421
Fraser, L. Lovat *v.* 68, 215
Frasers, Williamson *v.* 105, 110
[Frederick *v.* Maitland and Cunningham (37, 563)], . . 189, 193, 245
Freeland *v.* Freeland, ... 239, 295
Fulton, Mitchell *v.* 132, 329

Garden *v.* Rigg, ... 307
Gardener, Macilhose *v.* 233, 324
Gardner *v.* Ewing, ... 190, 320
Gardner *v.* Pearson, ... 112
Gardner, Brown *v.* 46, 233, 326
George *v.* Milne (8, 209), ... 217, 253
Gibb, Blair *v.* 314, 329
Gibson *v.* Pearson (5, 387), ... 229
[Gibson and Clark, Bannatyne *v.* (35, 56)], . . . 210, 213
Gilfillan *v.* Brown (5, 597), ... 119
Gillon *v.* Simpson (31, 130), ... 246, 280
Girvan, Mackenzie *v.* (13, 144), (15, 557), ... 268, 276, 279
Glasgow, B., and N. Ry. Co. *v.* Nitshill Coal Co. (22, 627), . 327, 382
[Glasgow Improvement Trustees, Lockerby *v.*], ... 58
Glasgow, Mag. of, Nasmyth *v.* 258
Glenkindy, Balhagartis *v.* 267
Glover *v.* Glover, ... 183, 237
Goldie, Ramsay *v.* 234
Gordon *v.* Abernethy, ... 194, 245
Gordon *v.* E. of Errol, ... 128
Gordon *v.* Fraser (7, 404), ... 421
Gordon *v.* Maitland, ... 234
Gordon *v.* Monteith, ... 178

Gordon *v.* Neilson, ... PAGE 161
Gordon *v.* Pitsligo, ... 57
Gordon, Calder *v.* (9, 242), ... 28
Gordon, Fraser *v.* (6, 485), ... 303, 313
Gordon, Lumsden *v.* 113
Gordon, Lumsden *v.* (14, 446), ... 252
Gourlay, Forrester *v.* 240
Gowans *v.* Duncan (31, 228), ... 184, 189, 327
Gowans, Halley *v.* (5, 550), ... 66, 336
Graham *v.* Pollok (20, 200), ... 73
Graham, Mell *v.* 331
Grant *v.* Claud Girdwood and Co., ... 114, 144, 303
Grant *v.* Grant, ... 319, 339
[Grant, Dickson *v.* (42, 264)], ... 131, 136
Grant, Ochterlony *v.* 8, 37
Gray *v.* Brown (5, 216), ... 222, 253
Gray *v.* Macnair (3, 607), ... 210, 211, 213, 260, 292
Gray, Macpherson and Co. *v.* 244
[Greenock Lodge of Operative Masons, Mackernan *v.* (45, 351)], . . 393
[Greenock and Wemyss Bay Rail. Co., Caledonian Rail. Co. *v.* (44, 134, 503)], ... 58, 78, 85
Grierson *v.* Scot, ... 45
Grieve, Taylor *v.* 295, 320
Grosat *v.* Cunningham, ... 233, 249
Guthrie, Cochrane *v.* (31, 205), (33, 430), ... 51, 321, 333
Gye and Co. *v.* Hallam (7, 532), ... 229, 249

Habkin, Short *v.* 240
Haddo, Wilson *v.* 299
Haig, Colquhoun *v.* 274, 278
Haliburton *v.* Haliburton, ... 240
Halkerton *v.* Wishart, ... 214
Halkett *v.* E. of Elgin, ... 177, 304
Hall, Smith *v.* 301
Hall, Carruthers *v.* (3, 36), ... 70
Hallam, Gye and Co. *v.* (7, 532), ... 229, 249
Halley *v.* Gowans (5, 550), ... 66, 336
Halliday, Bell *v.* 66, 250
Hamilton *v.* Hay, ... 239
Hamilton, Crawford *v.* 248
Hamilton, Tailfer *v.* 98, 320
Hardie *v.* Hardie, ... 330
Hartley, Anning *v.* 240
Hawkins *v.* Wedderburn (14, 336), ... 20
Hay *v.* E. of Eglinton, ... 49
Hay *v.* L. Advocate, ... 306
Hay, Hamilton *v.* 239
Hay, N. Brit. Railway Co. *v.* (24, 483), ... 391
Hay, Ramsay *v.* 123
Hays *v.* Hay, ... 338
Heggie and Co. *v.* Stark, ... 24, 154, 158
[Henderson *v.* Paul (39, 307)], ... 313
Henderson, Campbell *v.* 197
[Henderson, Paul *v.* (39, 209)], ... 180, 228, 323, 325

Henderson, Reid *v.* (13, 494), ... PAGE 271
Hendry's Trustees *v.* Renton and Co. (23, 60), ... 85, 89
Henry *v.* Hepburn (7, 178), ... 116, 231, 245
Henry *v.* MacEwan (7, 10), ... 69
[Henry, Burnet *v.*], ... 377
Hepburn *v.* Hepburn, ... 49
Hepburn *v.* Hepburn, ... 241
Hepburn, Henry *v.* (7, 178), ... 116, 231, 245
Hercules Insurance Co. *v.* Hunter, ... 28
Heriot, Brown *v.* 337, 339
Herriot, Wight *v.* 190, 324
Hetherington *v.* Carlyle, ... 331
Hickman, Stewart *v.* 282, 284
Higham *v.* Jessop, ... 299
Hill, Edin. and Glasg. Ry. Co. *v.* (12, 307), ... 42, 263
[Highland Rail. Co. *v.* Mitchell (40, 499)], ... 161, 356
[Hilton *v.* Walker (39, 538)], ... 228, 231
Holker *v.* Parker, ... 246
Home *v.* Scot, ... 53
Hood *v.* Baillie (5, 159), ... 60, 231
Hopetoun, E. of, *v.* Scots Mines Co. (28, 322), . . . 169, 187, 260
Howie, Miller *v.* (23, 272), ... 74
Hunter, Cairncross *v.* 205
Hunter, Hercules Insurance Co. *v.* 28
Hutton *v.* Adams (2, 277), ... 55

Inchaffray, L., *v.* Oliphant, ... 69
Inglis *v.* Renny, ... 234
Inglis, MacCallay *v.* 98, 121
[Inverness and Aberdeen Junction Rail. Co., Mackenzie *v.* (38, 429)], 124, 388
[Inverness and Ross-shire Rail. Co., Mackenzie *v.* (34, 125)], . . 131
Ireland *v.* Wilson (23, 579), ... 287

Jack *v.* Cramond, ... 314, 329
[Jackson, Welch *v.* (37, 146)], ... 34, 256
Jerviswoode, petitioner, ... 203, 209, 213
Jessop, Higham *v.* 299
Jeston, Kerr *v.* 299
Johnson, Livingston *v.* (2, 267), ... 114, 120, 270
Johnston *v.* Cheape, ... 132, 149, 297
Johnston *v.* Napier, ... 298
Johnston *v.* Robertson (33, 335), ... 234
Johnston, Dalgliesh *v.* 28, 328
Johnston, Robertson *v.* (7, 144), ... 20
Jolly *v.* Young (7, 103), ... 317
[Jopp, Trowsdale *v.* (38, 25)], ... 131

Kennedy *v.* Kennedy, ... 312
Ker, Roxburgh (P. Fiscal of) *v.* 55
Kerr *v.* Bremner, ... 257
Kerr *v.* Clerk, ... 50
Kerr *v.* Jeston, ... 299
Kidd *v.* Paterson, ... 249
King, Ferguson *v.* 66, 106

Kinloch, Anderson *v.* (8, 221), ... PAGE 230, 234
[Kintore, E. of, *v.* Union Bank (34, 35)], ... 121
Kirkaldy *v.* Dalgairns' Trs., ... 31, 143, 160, 178

Laing *v.* Caled. Ry. Co. (19, 14), (22, 135), ... 382
Lamb, Dunn *v.* (26, 494), ... 307, 309, 312
Lang *v.* Brown (25, 37), (26, 369), ... 184, 200, 240
Lang, Logan *v.* 27
Lang's Trustees, Stewart *v.* 20
Langmuir *v.* Sloan (12, 445), ... 168
Lashley, Steers *v.* 123
Latta *v.* Macrae (24, 319), ... 168
Lauder *v.* Wingate (24, 321), ... 71
Lawrie *v.* Taylor, ... 272, 321
Lawrie, Ewing *v.* 74
Lawrie, MacCallum *v.* 2, 313, 319
Ledingham *v.* Elphinston (32, 102), ... 39, 142
Leslie, Drummond, *v.* 317, 281
Leslie, E. of Rothes *v.* 240
Lindsay, Boswell *v.* 49, 304
Lindsay, Maxwell *v.* 319
Livingston *v.* Feuars of Falhouse, ... 55
Livingstone *v.* Black, ... 333
Livingstone *v.* Johnson (2, 267), ... 114, 120, 270
Lochinvar *v.* E. of Cassillis, ... 262
Locke *v.* Vulliamy, ... 247
[Lockerby *v.* Glasgow Improvement Trustees], ... 58
Lockhart, Caled. Ry. Co. *v.* (22, 89), (32, 468), ... 224, 384
Logan *v.* Lang, ... 27
Lovat, L., *v.* Fraser, ... 68, 215
Lovat, L., Fraser *v.* 21, 48
Love *v.* Love, ... 51
Low *v.* Banks (8, 387), ... 155, 340
Lumsden *v.* Gordon, ... 113
Lumsden *v.* Gordon (14, 446), ... 252
Lyle *v.* Falconer (15, 74), ... 216, 314
Lyle *v.* Neilson (16, 506), ... 279

Macanqual *v.* Boswell, ... 299
Macarthur, Baxter *v.* 171, 230, 278, 316
Macbryde *v.* MacRae's Executors, ... 182, 237, 256
Macbryde, Turnbull *v.* (30, 278), ... 20, 73
MacCallay *v.* Inglis, ... 98, 121
MacCallum *v.* Lawrie, ... 2, 313, 319
MacCallum *v.* Robertson, ... 171, 195
MacCaul *v.* Monkland Ry. Co. (3, 334), ... 20, 87
[MacCord *v.* Adams (34, 41)], ... 72, 78, 85
[MacCulloch and Fyfe, Birrell *v.* (39, 48)], ... 47, 75
Macdonald *v.* Macdonald (1, 268), ... 20
Macdonald *v.* Macdonald (16, 131), ... 42, 145, 149, 171
Macdonald, Tennent *v.* (8, 426), ... 136
Macdougal *v.* Wilson (30, 326), ... 98
Macdowall *v.* Macdowall's Creditors, ... 111
Macdowall's Creditors, Macdowall *v.* 111

[MacEwan *v.* Middleton (39, 87)], ... PAGE 60
MacEwan, Henry *v.* (7, 10), ... 69
Macfarlane *v.* Black (14, 533), ... 226, 293
Macfarlane, Campbell *v.* (7, 314), ... 20
Macgown, Fairley *v.* (8, 233), ... 270, 321
Macgregor *v.* Stevenson (19, 455), ... 150, 167, 248
Macgregor, Menzies *v.* 298
Macgregor, Wright *v.* 234
Macgrowther *v.* Watt, ... 20
[MacHolm, Campbell *v.* (36, 121)], ... 39, 41, 158
Macilhose *v.* Gardener, ... 233, 324
Macinturner, E. of Dunmore *v.* (7, 174), ... 24, 157, 179
Mackay, Calder *v.* (32, 301), ... 58
Mackenzie *v.* Calder, ... 60, 248
Mackenzie *v.* Clark, ... 136, 138, 329
Mackenzie *v.* Craigie, ... 234
Mackenzie *v.* Girvan (13, 144), (15, 557), ... 268, 276, 279
[Mackenzie *v.* Inverness and Aberdeen Junction Rail. Co. (38, 429)], 124, 388
[Mackenzie *v.* Inverness and Ross-shire Rail. Co. (34, 125)], . . 131
Mackenzie *v.* Mackenzie, ... 46
[Mackenzie *v.* Viscount Hill and Tennant (40, 499)], . . 42, 148, 150
Mackenzie, Matheson *v.* (14, 551), ... 187
Mackenzie, Munro *v.* 90
[M'Kernan *v.* Greenock Lodge of Operative Masons (45, 351)], . . 393
Mackessock *v.* Drew, ... 266, 295
[Mackintosh *v.* Mackintosh (36, 24)], ... 115
Mackintosh *v.* Robertson (6, 200), ... 121
Maclean *v.* Richardson (6, 469), ... 57
Maclellan *v.* Macleod (2, 559), ... 48, 220
Macleod *v.* Bisset, ... 226
Macleod, Maclellan *v.* (2, 559), ... 48, 220
Macnair *v.* Roxburgh (26, 189), ... 148, 158, 166
Macnair, Gray *v.* (3, 607), ... 210, 211, 213, 260, 292
Macnaughton, Barr *v.* (25, 18), ... 159, 174
Macpherson and Co. *v.* Gray, ... 244
Macphersons *v.* Ross, ... 27, 169
Macquaker *v.* Phœnix Assurance Co. (31, 418), . . 211, 240, 261, 292
Macrae, Latta *v.* (24, 319), ... 168
Macrae's Executors, Macbryde *v.* 182, 237, 256
Macrorie *v.* Macwhirter, ... 57
Macwhirter, Macrorie *v.* 57
Maddell, Moncur *v.* 240
[Maitland and Cunningham, Frederick *v.* (37, 563)], . . 189, 193, 245
Maitland *v.* Mitchell's Representatives, ... 102, 107, 301
Maitland, Gordon *v.* 234
Manson *v.* Doull (12, 491), ... 393
Marshall *v.* Edinburgh and Glasgow Railway Co. (25, 349), . . 204
Matheson *v.* Mackenzie (14, 551), ... 187
Maule *v.* Maule, ... 36, 246
Maule, Campbell *v.* 337
Maxwell *v.* Lindsay, ... 319
Maxwell *v.* Maxwell, ... 61, 63
Maxwell, L. Ross *v.* 137
Meikle, Percy *v.* 240, 321

Mell *v.* Graham, ... PAGE 331
Menzies *v.* Macgregor, ... 298
Menzies, Brakenrig *v.* (14, 109), ... 268, 277, 278, 283
[Menzies, Cameron *v.* (40, 249)], ... 41, 251
Mercer, Stewart *v.* 69, 253
Merry, Shaw *v.* 26
Merry and Cunningham *v.* Brown (31, 733), (32, 528), . . 51, 92, 186, 305
Middleton, *v.* Chalmers, ... 191
[Middleton, MacEwan *v.* (39, 87)], ... 60
Millar, Miller *v.* 39, 145, 170
Miller *v.* Howie (23, 272), ... 74
Miller *v.* Millar, ... 39, 145, 170
Millie or Whyte *v.* Fergus, ... 206, 226
Milne *v.* Mags. of Edinburgh, ... 78, 85, 89
Milne, George *v.* (8, 209), ... 217, 253
Milne, Watson *v.* 199
Mitchell *v.* Cable (20, 476), ... 37, 152, 175
Mitchell *v.* Fulton, ... 132, 329
Mitchell, Brysson *v.* 133, 189, 304
Mitchell, Campbell *v.* 240
Mitchell, Ferrie *v.* 53, 55
[Mitchell, Highland Rail. Co. *v.* (40, 499)], ... 161, 356
Mitchell, Maitland *v.* 102, 107, 301
Mitchell, Yates *v.* 281, 317
Moncur *v.* Maddell, ... 240
Monkland Canal Co., Dixon *v.* 271
Monkland Ry. Co., Eddie *v.* (27, 536), ... 308
Monkland Railway Co., MacCaul *v.* (3, 334), ... 20, 87
Monteith *v.* Carmichael, ... 299
Monteith, Gordon *v.* 178
Montgomerie (81, 82), ... 265
Montgomery *v.* Carrick (20, 504), (22, 79), ... 79, 177, 304
Montgomery *v.* Sempill, ... 319
Montgomery *v.* Strang, Lennox, and Co., ... 249, 314, 329
Montrose, E. of, *v.* Scott, ... 137
More, Pitcairn *v.* 239, 295
More, Wilson *v.* (5, 210), ... 266
Morgan *v.* Morgan, ... 135
Morison, Allardes *v.* 234
Morris and Co. *v.* Stewart, Rowell, and Co., ... 284
Morrison *v.* Aberdeen Market Co. (19, 696), ... 34
Morrison *v.* Robertson, ... 258
Mowbray *v.* Dickson (20, 405), ... 145, 289
Mowbray, Cook *v.* 125
[Muir, Thomson's Trustees *v.* (40, 83)], ... 115, 319
Muirhead *v.* Muirhead, ... 110
Muirhead *v.* Stevenson (20, 255), ... 359
Muirhead, Buchanan *v.* 32
[Mungle *v.* Young (44, 499)], ... 58, 78, 85
Munro *v.* Mackenzie, ... 90
Murray, Vans *v.* 306

Napier *v.* L. Elphinston, ... 317
Napier *v.* Wood (17, 80), ... 248

PAGE

Napier, Johnston *v.* 298
Napier, Reids *v.* 283
Nasmyth *v.* Mags. of Glasgow, ... 258
Nasmyth, E. of Selkirk *v.* 95, 177, 186
Neilson, Gordon *v.* 161
Neilson, Lyle *v.* (16, 506), ... 279
Neilson, Taylor *v.* 214, 266
Nitshill Coal Co., Glasgow B. and N. Railway Co. *v.* (22, 627), . 327, 382
North British Railway Co. *v.* Barr and Co. (28, 34), . . 50, 59, 249
North British Railway Co. *v.* Hay (24, 483), ... 391
North British Railway Co., Renton *v.* (19, 642), ... 66
[North British Railway Co., Trowsdale *v.* (36, 672)], . . . 131
Norton, Thomson *v.* 179, 198, 326

Ochterlony *v.* Grant, ... 8, 37
Officer, Baird *v.* (4, 197), ... 120
Ogilvie *v.* Ogilvie, ... 332
Oliphant *v.* Douglas, ... 244
Oliphant, L., Inchaffray *v.* 69
Ord, L. Elphinston *v.* 262
Orme *v.* Diffors (6, 114), ... 99
Orrell *v.* Orrell (31, 295), ... 59, 177, 327
Oswald, Davidson *v.* 85
Oswald, Pearson *v.* (31, 229), ... 3, 75
[Otto *v.* Weir (43, 574)], ... 55, 57

Parker, Holker *v.* 246
Paterson *v.* E. of Breadalbane, ... 312
Paterson *v.* Forret, ... 61
Paterson *v.* Sanderson, ... 231, 365
Paterson, Crawford *v.* (30, 263), ... 191, 237
Paterson, Kidd *v.* 249
[Paul *v.* Henderson (39, 209)], ... 180, 228, 323, 325
Paul *v.* Springbank Coal Co. (31, 229), ... 20, 271
[Paul, Henderson *v.* (39, 307)], ... 313
Pearson *v.* Oswald (31, 116), ... 3, 75
Pearson, Gardner *v.* 112
Pearson, Gibson *v.* (5, 387), ... 229
Pearson, Young *v.* 142, 338
Percy *v.* Meikle, ... 240, 321
Petrie, L. Duffus *v.* 254
Philp *v.* Swayne, ... 273
Phipps *v.* Edin. and Glas. Ry. Co. (15, 387), ... 20, 131
Phœnix Assurance Co., Macquaker *v.* (31, 418), . . 211, 240, 261, 292
Pitcairn *v.* Drummond, ... 65
Pitcairn *v.* More, ... 239, 295
Pitaligo, Gordon *v.* 57
Pollock, Baillie *v.* (1, 181), ... 49, 111, 245
Pollok, Graham *v.* (20, 200), ... 73
Portland, D. of, Wallace *v.* (2, 259), ... 320
Pott, Anderson *v.* (5, 73), ... 278
Potter *v.* Bartholomew (20, 18), ... 270, 283, 286

Ralston, Dunlop *v.* 313
Ramsay *v.* Goldie, ... 234

PAGE
Ramsay v. Hay, ... 123
Ramsay, Robertson v. 67
Reed, Templeman v. 51
Reid v. Henderson (13, 494), ... 271
Reid v. Walker, ... 95, 278
Reids v. Napier, ... 283
Renny, Inglis v. 234
Renton v. N. Brit. Ry. Co. (19, 642), ... 66
Renton and Co., Henry's Trs. v. (23, 60), ... 85, 89
Richardson, Dundee, P., and A. Ry. Co. v. (23, 246), . . 241, 327
Richardson, Maclean v. (6, 469), ... 57
Rigby, Street v. 31
Rigg, ... 193
Rigg, Garden v. 307
Roberton, Dudgeon v. (31, 193), ... 309
Robertson v. Brown (9, 117), ... 228
Robertson v. Cheyne (18, 224), ... 299, 302
Robertson v. Clephan, ... 34
Robertson v. Davidson (5, 390), ... 277
Robertson v. Johnston (7, 144), ... 20
Robertson v. Ramsay, ... 67
Robertson v. Stewart, ... 276
Robertson, Johnston v. 234
Robertson, MacCallum v. 171, 195
Robertson, Mackintosh v. (6, 200), ... 121
Robertson, Morrison v. 258
Ross, L., v. Maxwell, ... 137
Ross, Macphersons v. 27, 169
Ross, Stewart v. 321
Rosslyn, E. of, Mag. of Dysart v. (5, 116), ... 116, 120
Rothes, E. of, v. Leslie, ... 240
Rowan v. Crawford, ... 213
Roxburgh, Macnair v. (26, 189), ... 148, 158, 166
Roxburgh, P.-Fiscal of, v. Ker, ... 55
[Roy, Dykes v. (41, 208)], ... 45, 240
Runciman v. Craigie (3, 445), ... 199
Rutherford, Stoddart v. 102
Ruthven, L., v. Banff, ... 319

Saltpans (Tacksmen of), Wallace v. 91
Sanderson, Paterson v. 231, 365
Scot, Aytoun v. 105, 109
Scot, Grierson v. 45
Scot, Home v. 53
Scots Mines Co. v. E. of Hopetoun (28, 322), . . . 169, 187, 260
Scott v. Avery, ... 32
Scott, E. of Montrose v. 137
Scoular, Brown v. 111
Selkirk, E. of, v. Nasmyth, ... 95, 177, 186
Sempill, Montgomery v. 319
Shand v. Shand (4, 600), ... 98
Sharp v. Bury, ... 333
Sharpe v. Bickerdyke, ... 24, 170, 340
Shaw v. Merry, ... 26

[Shaws Water Co., Campbell *v.* (36, 564)], ... PAGE 91
[Shiels *v.* Shiels' Trustee], ... 58, 70
Shirreff, Dickson *v.* (3, 55), ... 363
Short *v.* Habkin, ... 240
Sillartonhill *v.* Blantyre (Prior of), ... 49
Simpson *v.* Strachan, ... 213, 260
Simpson, Gillon *v.* (31, 130), ... 246, 280
Sinclair, Young *v.* 234
Skeen *v.* Skeen, ... 205
Skelton, Abbott and Son *v.* 337
Sloan, Langmuir *v.* (12, 445), ... 168
Smith *v.* Banks (2, 474), ... 47, 228, 270
Smith *v.* E. of Fife's Trs. (15, 345), ... 85, 92
Smith *v.* Hall, ... 301
Smith, Tyerman *v.* 322
Smith, Whitmore *v.* 247
South Devon Ry. Co., Elliot *v.* 133
Spearman *v.* Steele, ... 170
Springbank Coal Co., Paul *v.* (31, 116), ... 20, 271
Stark *v.* Thom, ... 179, 295, 326
Stark *v.* Thumb, ... 69, 215
Stark, Heggie and Co. *v.* 24, 154, 158
Steele *v.* Steele, ... 63
Steele, Spearman *v.* 170
Steers *v.* Lashley, ... 123
Stevenson, Macgregor *v.* (19, 455), ... 148, 167, 248
Stevenson, Muirhead *v.* (20, 255), ... 359
Stewart *v.* Hickman (16, 117), ... 282, 284
Stewart *v.* Lang's Trustees, ... 20
Stewart *v.* Mercer, ... 69, 253
Stewart *v.* Ross, ... 321
Stewart *v.* Watherstone, ... 178
Stewart, Robertson *v.* 276
Stewart, Walker and Co. *v.* (27, 323), ... 272, 283
Stewart, Rowell, and Co., Morris and Co. *v.* 284
Stirling and Dunf. Ry. Co. *v.* Edinr. and Glasg. Ry. Co. (28, 619), . 49
Stoddart *v.* Rutherford, ... 102
Stonehewer *v.* Farrar, ... 239
Stormonth, Watson *v.* 102
Strachan, Simpson *v.* 213, 260
Strang, Lennox, and Co., Montgomery *v.* 249, 314, 329
Street *v.* Rigby, ... 31
Stuart, Cooper *v.* 234
Swayne, Philp *v.* 273
Swinfen *v.* L. Chelmsford, ... 120

Tailfer *v.* Hamilton, ... 98, 320
Tait *v.* Wilson (3, 470), ... 98, 100
Taylor *v.* Grieve, ... 295, 320
Taylor *v.* Neilson, ... 214, 266
Taylor, Laurie *v.* 272, 321
Telfer. *See* Tailfer.
Telfer and Co. *v.* Bell, ... 189, 191
Templeman *v.* Reed, ... 51

Tennent *v.* Macdonald (8, 426), ... PAGE 136
Thallon *v.* E. of Wemyss' Trustees (28, 24), ... 208
Thom, Stark *v.* 179, 295, 326
Thomson *v.* Norton, ... 179, 198, 326
Thomson, Falconer *v.* 105, 111
[Thomson's Trustees *v.* Muir (40, 83)], ... 115, 319
Thumb, Stark *v.* 69, 215
Torbet *v.* Borthwick (21, 231), ... 229
Torphichen, L. 55
[Tough *v.* Dumbarton Waterworks Comrs. (45, 162)], . . 58, 78, 85
[Trowsdale *v.* Jopp (38, 25)], ... 131
[Trowsdale *v.* N. Brit. Rail. Co. (36, 672)], ... 131
Tunno *v.* Bird, ... 188
Turnbull *v.* Macbryde (30, 278), ... 20, 73
Tyerman *v.* Smith, ... 322

[Union Bank, Earl of Kintore *v.* (34, 35)], ... 121
Ury, Dalgetie *v.* 251

Vans *v.* Murray, ... 306
Vere *v.* Dale, ... 105
[Viscount Hill and Tennant, Mackenzie *v.* (40, 499)], . . 42, 148, 150
Vulliamy, Locke *v.* 247

[Walker, Hilton *v.* (39, 508)], ... 228, 231
Walker and Co. *v.* Stewart (27, 323), ... 272, 283
Walker, Reid *v.* 95, 278
Wallace *v.* D. of Portland (2, 259), ... 320
Wallace *v.* Tacksmen of Saltpans, ... 91
Wallace *v.* Wallace, ... 338
Wallace, Anderson *v.* 154
[Walls *v.* Connell (34, 535)], ... 336
Wark, Bargaddie Coal Co. *v.* (31, 323), ... 57
Watherstone, Stewart *v.* 178
Watmore *v.* Burns (11, 444), (14, 57), ... 282
Watson *v.* Milne, ... 198
Watson *v.* Stormonth, ... 102
Watson, Berry *v.* 143, 151, 160
Watt *v.* Wright's Trustees (21, 344), ... 73
Watt, Macgrowther *v.* 20
Wauchope *v.* Edinr. and Dalk. Ry. Co. (18, 447), ... 66
Wedderburn, Hawkins *v.* (14, 336), ... 20
[Weir, Otto *v.* (43, 574)], ... 55, 57
[Welch *v.* Jackson (37, 146)], ... 34, 256
Wemyss *v.* Wemyss, ... 46
Wemyss', E. of, Trustees, Thallon *v.* (28, 24), ... 208
White or Millie *v.* Fergus, ... 206, 226
Whitefoord, Cuninghame *v.* 110
Whitehead *v.* Finlay (6, 60), ... 229, 248
Whitmore *v.* Smith, ... 247
Wight, Barbour *v.* 114, 300
Wight, Herriot *v.* 190, 324
Williamson *v.* Dinwiddie, ... 56
Williamson *v.* Frasers, ... 105, 110

Williamson, Fraser *v.* . . . . . PAGE 54
Wilson *v.* Haddo, ... 298
Wilson *v.* More (5, 210), ... 266
Wilson, Fleming *v.* 48, 298, 325
Wilson, Ireland *v.* (23, 579), ... 287
Wilson, Macdougal *v.* (30, 326), ... 98
Wilson, Tait *v.* (3, 470), ... 98, 100
Wingate, Lauder *v.* (24, 321), ... 71
Wishart *v.* Falconer, ... 56, 214
Wishart, Halkerton *v.* 214
Woddrop *v.* Finlay, ... 251
Wood, Anderson *v.* 114, 284
Wood, Napier *v.* (17, 80), ... 248
Woodside *v.* Cuthbertson (20, 192), ... 119
Wright *v.* Macgregor, ... 234
Wright, Fraser *v.* (10, 444), ... 315
Wright's Trustees, Watt *v.* (21, 344), ... 73

Yates *v.* Mitchell (20, 451), ... 281, 317
Young *v.* Pearson, ... 142, 338
Young *v.* Sinclair, ... 234
Young, Broomfield *v.* 234
Young, Jolly *v.* (7, 103), ... 317
[Young, Mungle *v.* (44, 499)], ... 58, 78, 85
Younger *v.* Caled. Ry. Co. (20, 34), ... 232

INTRODUCTION.

INTRODUCTION.

RESORT has often been had, both in ancient and modern times, to the settlement of disputes by Arbitration, rather than by the intervention of Courts of law. It even seems probable that the origin of this amicable private tribunal is of an earlier date than the regular establishment of public Courts, and that Arbitration, in fact, took its rise in the very infancy of Society. Whenever any parties had a dispute respecting the right to a valuable subject, which, from the equal strength of the competitors, or from other causes, it was inconvenient to settle by a mere appeal to force and violence, but which nevertheless required to be brought to a settlement, nothing seems more likely than that they should bethink themselves of the expedient of referring the question to some mutual friend, or neutral third party, as umpire between them, and agreeing to abide by his decision.

There is indeed one *cause célèbre* in the law of arbitration, of a date so remote that it belongs to fabulous antiquity; the famous award which was delivered on Mount Ida, by the royal shepherd Paris,[1] on the competing claims of Juno, Pallas, and Venus, contending for the prize of Beauty. It is narrated that, on the failure of all other means of adjudicating on the rights of rivals so powerful and so excited, the difficulty was overcome by the parties agreeing to a submission to Paris as sole arbiter; and thus the dangerous dispute was speedily decided by a final judgment, and the goddess Discord was balked of her aim.

It is true that this tale belongs to fable and mythology. But when so grave an authority as Lord Bacon, in his "Wisdom of the Ancients," has not disdained to examine and analyse this class of traditions, as preserving embalmed specimens of the pristine philosophy or experience of mankind, and merely clothing these in an allegorical guise, it is not perhaps inadmissible here to notice the fable in question, as indicating at least the high probability, that the amicable process of decision by means of arbitration, had naturally

[1] "*Arbiter* es formæ; certamina siste Dearum."—Ovid, Heroid., Epist. xvi. 69.

suggested itself to the minds of men, and had interwoven itself with their usages, at an age so early as to be apparently little less than coeval with the institution of civil society itself.[1]

But even after regular Courts of law had been duly established, and were so constituted as to command the respect and confidence of the community, recourse to arbitration continued nevertheless to be frequent among many of the most civilised nations, at all periods of history. Various causes have contributed to this result. There are many questions which, in their own nature, are best suited for the determination of a judge who is expressly selected by the parties themselves on account of his special fitness for trying cases of that particular class. Purely mercantile questions are often of this description. In those, for instance, arising between partners, on a dissolution of their copartnery, which involve the examination of merchants' books and accounts, and which require an intimate practical acquaintance with commercial usages and affairs, it can scarcely be doubted that parties, having a dispute, would generally act with prudence in selecting one or more mercantile men of experience, firmness, and impartiality to arbitrate between them. In a public court the judge or the jury would probably require the aid of such men, before disposing of cases like these. And where this aid can be attained, in the most effective manner, by having direct recourse to a competent merchant, chosen by the parties themselves to judge between them, it is natural that such a tribunal should frequently be preferred to any other.

In like manner, if parties have a dispute which must turn on the opinion or professional knowledge of a practical engineer, a practical shipwright, an architect, or the like, it will often be most beneficial, —if the parties can agree upon an engineer, shipwright, etc., on whose good sense and integrity they have full reliance,—that, in place of resorting to a court of law, they should submit their disputes to him, and bind themselves to abide by his decision.

There is also a large and daily increasing class of cases which fall under arbitration, in connection with the extrication of extensive working contracts, whether in relation to public undertakings, such as railways, etc., or to private interests, such as mineral leases or the like. In a mineral lease, for example, it is foreseen that, under the mutual and detailed stipulations of the parties, many questions may

[1] "The introduction of arbitration seemed to be coeval with the foundation of our law;" per L. Pres. Blair, in MacCallum, etc., June 26, 1810; F. C. "Lors des premières sociétés, les differends se jugeaient par les pères de famille; de là est venu le nom de tribunal patriarchal, donné à celui des arbitres. Le commerce, aussi ancien que le monde, n'avait point autrefois, pour ses faits civils et commerciaux, d'autre tribunal."—Boucher's introductory "Recherches," etc., prefixed to his French translation of Il Consolato del Mare. Paris, 1808. T. i. p. 3.

arise as the work proceeds, which will require speedy as well as equitable adjustment for the sake of all concerned, and for the purpose of carrying on, both fairly and uninterruptedly, the out-put of minerals so long as they are workable at a profit. Nothing is more common than to provide for the disposal of such disputed questions, by inserting in the lease a special clause of submission, which names an arbiter to whom they shall be referred, from time to time as they may arise, and by whose award the parties agree to be bound. "In leases of long endurance in which there are operations to be carried on, which may be well or ill carried on,—which may be carried on in a way prejudicial to the landlord, or during the currency of which the landlord may fail in the performance of some of the matters that are incumbent upon him, or may do some things that are prejudicial to the interest of the tenants,—this kind of clause is very desirable and very advantageous; and the practice has become almost universal, of introducing such clauses into mineral leases." "Many points may arise in the course of a lease which a skilled arbiter may, by personal inspection, immediately understand and settle, which might have otherwise required the intervention of a court of law, with all the delay and expense incident to such proceedings."[1]

Besides, there are whole classes of cases in which, from special circumstances—such as the near relationship of the antagonists, or the intimate confidence which has at one time subsisted between them, or the indelicate nature of the investigation which is involved, etc.—it is best in every respect that the controversy should be conducted and decided before a private tribunal. And as two invaluable statutes[2] have required, that every cause depending in the courts of law of Scotland, shall (with a few limited and proper exceptions) be conducted with open doors, in the presence of the public, it is in the forum of the arbiter alone that a thorough discussion can take place, at the same time that painful and inexpedient publicity is avoided.

In addition to these and similar sources of arbitration-business which might be enumerated, there is another which, it is believed, has a large application. The delay and expense, incidental to procedure before a court of law, are unfortunately proverbial. It is too little considered that, in many cases, great part of this is not due to the particular tribunal, but is inseparable from the arduous judicial task of tediously extricating the conflicting interests and contradictory statements of keenly antagonistic parties. Still, there necessarily is something cumbrous, as well as costly, in all court machinery. The hope, accordingly, is reasonably entertained, that both time and money may be saved by escaping from the unbending forms of a public tri-

[1] Per L. Pres. M'Neill, in Pearson, Feb. 4, 1859; 21 D. 424. See also L. Mackenzie, in Anderson, Feb. 27, 1850; 12 D. 787.

[2] 1693, c. 26 and 27.

bunal, to the more pliant and elastic procedure before an arbiter. And when that procedure is in the hands of an arbiter who combines decided firmness of character, with promptness and penetration, parties will find this hope not unfrequently realised.[1]

It would accordingly appear, that, from these and other causes, the system of arbitration has always been favourably regarded in the most civilised countries, both in ancient and modern times. A brief retrospective glance at this subject, however perfunctory, can scarcely be thought devoid of interest by those who reflect that the system of arbitration is, in its own nature, ancillary to the dispensation of justice, and to the consequent maintenance of tranquillity and content among the members of a national community; insomuch that it forms an important part of the social economy of any country, and may even perhaps be regarded as one of the finer tests of its civilisation.

The practice of arbitration certainly prevailed to a great extent among the Greeks[2] as well as among the Romans. It appears that, at Athens, there were two classes of persons, both of whom, in the absence of a more appropriate designation, have been termed arbiters —the public and the private. The former, who required to be at least fifty years of age, were chosen annually by lot by the respective tribes at the sight of a magistrate, and had jurisdiction in pecuniary claims. They took an oath *de fideli*, but they had little in common with the modern arbiter, and may more correctly be regarded as a class of inferior public judges, since an appeal regularly lay from their awards to a court of law.

The private arbiters, however, in their character and functions, seem to have had a close resemblance to the arbiter of later times. They were selected by the parties themselves; the extent of their powers, in each respective case, depended on the contract of parties; they took an oath to decide impartially; and the parties bound themselves to abide by their award, against which no appeal lay to any court of law.

The regulating Athenian law on this subject is quoted in full by Demosthenes in his pleading against Meidias, and is expressed in the following pointed terms:—"If parties have a dispute with each other respecting their private obligations, and desire to choose an arbiter, be it lawful to them to select whomsoever they will. But when they have mutually selected an arbiter, let them stand fast by his decision,

[1] This favourable aspect of arbitration-procedure has seldom been more strongly expressed than in Voet's Commentaries on the Pandects, l. 4, t. 8, sec. 1:—"Arbitros adiri, litis finiendæ et judicii solennis evitandi gratiâ, frequens est; quippe ad quos confugere solent, quos terrent graviores litium sumptus, judiciorum strepitus, molestique labores et injuriosæ protelationes, ac denique onerosa atque tædiosa exspectatio incerti juris."

[2] "L'Arbitrage a été singulièrement usité chez les Grecs."—Boucher's "Recherches," etc. (*supra*, p. 2), T. i. p. 4.

and by no means carry an appeal from him to another tribunal; but let the arbiter's sentence be supreme."[1]

Among the Romans it is evident that the employment of arbitration *ad finiendas lites* had largely obtained from an early period. This appears not only from the mention made of arbiters in the laws of the Twelve[2] Tables, and in various writers,[3] particularly Cicero,[4] but still more from the number of practical topics in arbitration-law,

[1] See the law itself in Demosthenes' oration against Meidias (Dem. ex rec. Dindorf., Oxon. 1846: Tom. ii. p. 572).

It will be observed that, from the terms of the above law, it was only matters of Contract, or "private obligation," which fell under the jurisdiction of the arbiters.

It is also to be remarked, that, notwithstanding the apparently strong terms of the law in question, it remained in the power of either party to resile from the submission at any time before an award was actually given forth,—a peculiarity which is all the more noticeable from its similarity to the law of England, prior to the Statute 3 and 4 Will. IV. c. 42 (*infra*, p. 9). Near the close of the third speech of Demosthenes against his tutor Aphobus, he narrates the past history of his suit, and states that, 1st, There had been a reference by Aphobus and himself to three arbiters, but that Aphobus revoked the submission as soon as he discovered that the arbiters were adverse to his pleas; 2d, That Aphobus had then resorted to a public arbiter, chosen by lot, who gave an award against him; and, 3d, That Aphobus had appealed against that award to a judge and jury. The latter, it may be noticed, were always sworn, and were a numerous body. See third oration against Aphobus (Demosth. ex rec. Dind., Oxon. 1846: Tom. ii. p. 896).

For some further references as to the state of arbitration among the Greeks, see a learned treatise by C. R. Kennedy, in App. x. to his translation of the speeches of Demosthenes, vol. iii. p. 32. He particularly quotes the authority of Hudtwalcker, *Ueber die Diäteten*. See also Potter's Archæol. Græca, lib. i. c. 22.

[2] Tab. ii. L. 2.

[3] "Simus et Crito,
Vicini nostri, hic ambigunt de finibus;
Me cepere arbitrum," etc.
Terence, Heautont., Act. iii. sc. 1, v. 92.

"Esto bonus miles, tutor bonus, arbiter idem
Integer," etc. Juv., Sat. viii. 79.

[4] See the distinction which is drawn by Cicero between the rigour of strict law and the equitable practice of arbitration, in his *Oration* for *Quintus Roscius*, cap. 4 and 5:—"Aliud est judicium, aliud arbitrium. Judicium est pecuniæ certæ; arbitrium incertæ. Ad judicium hoc modo venimus, ut totam litem aut obtineamus aut amittamus: ad arbitrium hoc animo adimus, ut neque nihil, neque tantum, quantum postulavimus, consequamur. Ejus rei ipsa verba formulæ testimonio sunt. Quid est in judicio? directum, asperum, simplex. 'Si paret H-S 1000 dari oportere.' Hic, nisi planum facit, H-S 1000 ad libellam sibi deberi, causam perdit. Quid est in arbitrio? mite, moderatum, 'Quantum æquius melius, id dari,' etc." [The *arbitrium* here spoken of, though in some respects analogous to private arbitration, was a form of action in a court of law.—Gaius 4. 48; Inst. 4. 6. 31.] It is interesting to the modern student of law to notice, in passing Cicero's account (*Ib.* cap. 8) of the numerous fixed styles of Roman libels, some one of which was apparently imposed on every litigant, as a stereotyped style to suit his case: "Sunt jura, *sunt formulæ de omnibus rebus constitutæ*, ne quis aut in genere injuriæ, aut ratione actionis errare possit: expressæ sunt enim ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata lis accommodetur."

In England, as early as 1698, it was thought expedient to give statutory encouragement to arbitration, and the Act 9 and 10 Will. III., c. 15, was passed, "for determining differences by arbitration." This statute set forth the purpose of "promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters." It was thereby made lawful for all parties, having a dispute of the description there set forth,[1] to agree that their submission thereof to arbitration "should be made a Rule of any of his Majesty's Courts of Record;" and an affidavit thereof being duly produced and entered of record in such court, a Rule should "thereupon be made by the said court, that the parties shall submit to, and finally be concluded by, the arbitration or umpirage." In case any party "neglected or refused to perform and execute" such arbitration or umpirage, he was made "subject to all the penalties of contemning a Rule of court." Process was to issue from such court accordingly, which was not to be "stopped or delayed in its execution by any order," etc., of any court, unless it should "be made to appear, on oath, to such court, that the arbitrators or umpire misbehaved themselves, *and* that such award, arbitration, or umpirage, was procured by corruption or other undue means."[2]

It would appear probable that it was the intention of the English Legislature, by this statute, to give that conclusive efficacy to procedure before an arbiter, without which there is scarcely any appreciable benefit derivable from it.[3] This may be plausibly inferred, both from the words of the statute and from some of the earlier decisions pronounced under it.[4] But, however this may be, the statute has

[1] "Any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity."

[2] It appears that "a parol submission cannot be made a rule of court within the statute."—Russ. 59, [4th ed., 54].

It would appear also that the English statute only "contemplates controversies existing before the submission, and differences for which there is a legal or equitable remedy, but not, it seems, subjects of arbitration, which cannot be classed under these heads;" and so it was thought not to apply to an "agreement to sell land at a price to be fixed by arbitrators."—Russ. 61, [4th ed., 56].

[3] This, accordingly, was the view of L. Kames, as was strongly expressed by him in reporting the case of Ochterlony, Aug. 8, 1754 (4470).

[4] "Nothing is a ground within the statute 9 and 10 Will. III. c. 15, for us to set aside an award, but manifest corruption in the arbitrators. We will not unravel the matter, and examine into the justice and reasonableness of what is awarded."—*Per curiam* in Anderson (Easter Term. Geo. I.) 1 Strange 301. In observing on this case *Russell* remarks: "The restriction, however, imposed by the language of the Act, has subsequently been much disregarded, for the courts will listen to applications to set aside awards under the statute, on other grounds than the two enumerated in the section."—P. 658, [4th ed., 657].

not been so applied by the courts of law in England, which have held themselves at liberty to set aside awards on other grounds than those enumerated in the statute.

Arbitrations have also been often defeated in England, in consequence of its having been held that the authority given to an arbiter, under a submission, was *sua natura* revocable by either party, so as to let in the jurisdiction of the ordinary Courts at any time before an award was made. This state of the law led obviously and naturally to the abuse, that a party frequently revoked the arbiter's authority as soon as he had reason to anticipate an unfavourable award.[1] To prevent the delay and useless expense which were thus occasioned, and "to render references to arbitration more effectual," the Legislature, after the lapse of nearly a century and a half, enacted the remedy contained in 3 and 4 Will. IV. c. 42, sec. 39. Under this statutory provision, the power of an arbiter (if appointed by any rule of court, etc., in any action, or in pursuance of an agreement of parties that the submission should be made a rule of court) was declared to be irrevocable by either party without the leave of the Court. And the Courts of law have taken occasion to intimate that they will very sparingly exercise the discretionary power which is given to them, of granting leave to revoke.[2]

Of late years, additional efficiency has been given, in England, to the tribunal of the arbiter, partly by the arbitration clauses of the statutes relating to railways and other public undertakings,[3] and partly by the Common Law Procedure Act, 17 and 18 Vict. c. 125. Under this Act, important powers were conferred on the judges of the Superior Courts at Westminster (secs. 3 and 6), to impose compulsory references upon parties, where "the matter in dispute consists, wholly or in part, of matters of mere account, which cannot be conveniently tried in the ordinary way." The Act also gives powers to the Court to appoint arbiters in various contingencies, upon the failure of either party so to do. The strain of the Act clearly indicates the importance which the Legislature attaches to this mode of adjusting controversies; and it embraces various provisions which are expressly intended to remedy defects which are incident to arbitration process, by preventing the lapse of the submission, and expediting procedure under it.

It may be noticed here, with respect to one great province of the social system in Britain—that which regards the mutual relations of Masters and Workmen—that it has been the especial object of the Legislature, for upwards of a century, to promote the settlement of disputes between these classes, in the quietest and most summary

[1] Russ. 154, [4th ed., 144]. [2] Russ. 156, [4th ed., 146].
[3] See *infra*; Statutory Arbitration (Bk. vi. chap. xiii.)

manner, by arbitration. The statutes which were successively enacted for that purpose will be found enumerated in the first section of 5 Geo. IV. c. 96,[1] which was passed "to consolidate and amend the laws relative to the arbitration of disputes between masters and workmen."

The statute narrates the expediency of making one general law on this subject, "applicable to every description of trade and manufacture;" and it enumerates great and comprehensive classes of questions which shall fall within its provisions (sec. 2). It empowers either party to demand an arbitration (sec. 3); and if no other mode be specially agreed upon by the parties (sec. 13), it provides, under certain safeguards, for the selection of two arbitrators: one chosen by the master from a certain short list of masters, foremen, etc., prepared, as there provided, by a Justice of the Peace; and one chosen by the workmen, from a certain short list of workmen, similarly prepared,—all being resident in the neighbourhood (sec. 3). Very summary procedure is contemplated; and, in particular, it is enacted that (when the parties do not enlarge the time), if the arbitrators do not pronounce an award within three days after their appointment, they shall devolve the matter upon one or more Justices of the Peace, who shall decide within two days thereafter (sec. 10). Any award under the Act is final, and not subject to review (secs. 8 and 10). The award may be enforced by distress and imprisonment (sec. 24); which imprisonment may still, by special statute,[2] take effect, notwithstanding the Act[3] abolishing imprisonment in Scotland for debts not exceeding £8, 6s. 8d. Both the award and the submission may be written on unstamped paper; and no costs are to be allowed to a master unless the proceedings of the workmen have been "vexatious and oppressive."

The statute appears to have been framed in a philanthropic spirit; but perhaps its practical operation may be materially impeded by the circumstance that its provisions would frequently have the effect of devolving the dispute upon one or more Justices of the Peace, not selected by the parties themselves to be their arbitrators. Each of the two original arbitrators being selected respectively from the masters, foremen, etc., by a master, and from the workmen by workmen, there would seem to be no inconsiderable probability of their being influenced by class-feeling, and differing from each other in opinion respecting the dispute submitted to them. And if so, they are enjoined, as has been already noticed, after the lapse of three days (where the time is not enlarged by the parties), to devolve the matter upon one or more Justices of the Peace. Nevertheless, this

[1] See also 7 Will. IV. & 1 Vict. c. 67 [and 35 & 36 Vict. (1872), c. 46].
[2] 19 and 20 Vict. c. 46.
[3] 5 and 6 Will. IV. c. 70.

series of statutes well deserves attention, as it forms no uninteresting chapter in the domestic economy of the country, and bears strong testimony to the reliance which the British Legislature inclines to place upon the amicable tribunal of the arbiter, as being well adapted to sopite a class of disputes of a peculiarly exciting, and sometimes of a dangerous character.[1]

In Scotland[2] a remarkable historical instance was afforded, early in the seventeenth century, of the aptitude of the procedure, under the form of a submission, for disposing amicably of questions which threatened to be attended with perilous consequences to the peace of the realm, if left to the decision of the public courts according to the strict rules of law. When Charles I., on his accession, endeavoured to restore the dilapidated revenues of the Scottish Crown, and probably to pave the way to ulterior political objects, by revoking the profuse grants of Popish benefices which James VI. had made in favour of the Lords of Erection and others, soon after the Reformation, he invaded so many important patrimonial interests, including those of the greatest families in Scotland, that an extreme ferment was immediately created throughout the kingdom. On the king's following up this proceeding by an action of reduction of the grants in question, as being illegal and invalid, the agitation assumed so threatening an aspect, that all parties felt an earnest desire to discover some method of reasonable arrangement or compromise, by which their respective claims might be adjusted, without either side being driven to extremity by the unqualified success of the other. In these circumstances, after various communings, and probably some approach to a mutual understanding, the expedient was resorted to of making four formal submissions to the king, as sole arbiter. These embraced, respectively, the interests of the Lords of Erection, titulars, and tacksmen of teinds; and the heritors of lands "desirous to have right and title of the teinds of their own lands;" as also the interests of the bishops and clergy; and those of the "free royal burghs," for their right to the teinds bestowed on them by royal grants "for sustentation of the Ministry, Colleges, Schools, and Hospitals." The submissions were made in 1628, and awards were pronounced by the king in 1629, which, by containing measured concession, mixed with

[1] The attention of the Legislature has further been directed to this subject by a Bill introduced into Parliament in the session 24 and 25 Vict., for enabling masters and workmen, "when licensed by her Majesty, to form Equitable Councils of Conciliation or Arbitration," in order to the settlement of their differences. The measure was intended to be supplementary to the Master and Workman Acts above mentioned, not to repeal them. It did not, however, pass into law. [These Acts are now supplemented by 35 and 36 Vict. c. 46.] For statutory provisions as to Friendly Societies, etc., see Statutory Arbitration.

[2] [For the early Scotch legislation on the subject, from the twelfth century down to the Union, see General Index to Scottish Acts of Parliament, *voce* Arbitration.]

various salutary public provisions, disposed of the questions in issue on such a footing as tranquillised the country, at the same time that it accomplished, to a considerable extent, the objects which the king had in view. The procedure was, of course, entirely anomalous in its character; and to assure unquestioned validity to the awards pronounced by the Sovereign, they were all ratified afterwards in a Parliament at which he presided in person.[1]

It would be out of place here to inquire how far the great national excitement in Scotland, which, after having subsisted for some time, was thus allayed, may have proved an important element in giving an early momentum to that disturbance of the relations between the Crown and the people, which so signally characterised the reign of Charles I.[2] It would equally be out of place to dwell on the benefits which accrued to Scotland, by the foundation which was laid in these proceedings for the abolition of the oppressive and ruinous practice of drawn teind; the institution of the valuation and sale of teinds; and the introduction of a well-organised system which makes progressive provision for the sure and competent support of the ministers of the Established Church. But, without enlarging on these interesting subjects, the remarkable but anomalous submissions and awards in 1628 and 1629 are noticed in passing, as being a striking incident in the history of submission-procedure in Scotland, and as affording a somewhat unusual illustration of the adapting of the amicable tribunal of arbitration to the settlement of dangerous and exciting disputes.

To return to more strictly professional ground; it appears that, in Scotland, prior to the Regulations which were enacted in 1695, the Courts of law, after a good deal of oscillation, had unfortunately come to admit the challenge of an award upon the allegation of iniquity, committed by the judge, or of enorm lesion suffered by the party.[3] This, in other words, laid an award practically open to be reviewed upon its merits, at the discretion of the Court, in every case. Such a result was subversive, in substance, of the whole benefit which can be derived from arbitration, and was directly at variance with the object which parties have in view in resorting to the judgment of an arbiter. Accordingly, a few years prior to the English Act of 1698, a remedial provision was made in Scotland on this important subject, by one of the "Articles of Regulation concerning the Session, dated the 29th of April 1695," and recorded in the books of Council and Session on the 2d day of November of that year.

[1] See the submissions and the awards printed at the close of the Acts of Charles I., in the common edition of the Scots Acts. The ratification of the awards will be found in 1633, c. 14, 15, 16, 17, 18, 19. See also—1. Connell on Tithes, 214; 2 Ersk. 10. 26.

[2] See a curious anecdote on this subject, in Connell on Tithes, 216, note.

[3] 4 Ersk. 3. 35.

These articles were made in pursuance of the statute 1693, c. 34, which authorised the issuing of a royal "Commission for Regulation of Judicatories." The Commissioners, to be appointed by the king for this purpose, were thereby authorised to make "such Orders, Acts, and Constitutions" as they should consider to be just; "all which Acts, Ordinances, and Constitutions to be made by the said Commissioners, and approven under his Majesty's royal hand, their Majesties, with the advice and consent foresaid (of the Estates of Parliament), do Ratify, Approve, and Confirm, and Decern and Ordain to be put in execution, and to have full force, strength, and effect," etc.

The Articles of Regulation, consisting of "the Acts, Orders, and Constitutions" which were framed by the Royal Commissioners, have prefixed to them a deliverance by King William III., dated at Kensington, on 29th April 1695, by which his Majesty "Approves and Ordains the same to be put to execution, and to have full force, strength, and effect, conform to the late Act of Parliament, made thereanent; and Ordains the same, together with this Approbation, both superscribed by his royal hand, to be recorded in the books of Secret Council and Session, and thereafter published and printed, that none pretend ignorance."

The 25th of these Acts, or Articles of Regulation, is in the following terms:—"That, for the cutting off of groundless and expensive pleas and processes in time coming, the Lords of Session sustain no reduction of any decreet-arbitral that shall be pronounced hereafter upon a Subscribed Submission, at the instance of either of the parties-submitters, upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood, to be alleged against the judges-arbitrators who pronounced the same."

It has been always held in Scotland, and the doctrine has been lately affirmed in the court of last resort, that the foresaid 25th Act of the Articles of Regulation "has statutory force, and is as binding as a statute, power having been delegated to the Court by the Legislature to make the Act of Sederunt, and the Act having afterwards been adopted by the Legislature."[1]

The period at which the Articles of Regulation were enacted is conspicuous in the internal history of Scotland, for the improve-

[1] Per L. Brougham and L. Campbell, in Mackenzie, 9 Mar. 1843. 2 Bell's App., 48; see also L. Cottenham, p. 51.

It may be noticed that the above term, "*Act of Sederunt*," is not an accurate description of the Articles of Regulation. An Act of Sederunt is passed by the authority of the Lords of Council and Session alone, and of course possesses no statutory force. But as the Court of Session were enjoined to record the Articles of Regulation in the books of Council and Session, where all the Acts of Sederunt are regularly recorded, the 25th of the Articles of Regulation has sometimes been referred to in England, in the discussion of arbitration questions, by the designation of an "Act of Sederunt."

ments which were made by the practical sagacity and learning of the great Lawyers who then influenced the municipal legislation of the country. These lawgivers well deserve to be regarded as prominent among the public benefactors of that memorable era, for the masterly simplicity with which they applied a sound remedial principle, so as exactly to remove the practical defect at which it was aimed, without disturbing the general symmetry of the system thus reformed; and not less for the instructed and perspicacious providence with which they eschewed all rash and crude innovation.

The effect of the 25th Act of the Articles of Regulation above quoted, has been pre-eminently beneficial to the system of arbitration; and yet it truly did little or nothing else than to restore the Contract of Submission to its native force and vigour, and to secure for an arbiter's award that degree of *conclusive finality*, which it was the very object of both parties to confer upon it, when they originally entered into the contract. The views of the courts of law have, at times, varied to some extent, as will be hereafter noticed, in regard to the true scope and application of the Act. Their views have also varied somewhat respecting the effect which is intrinsically due to the pure Contract of submission itself, according to its own essential character and proper legal attributes at common law. Yet, nevertheless, without requiring aid from any subsequent legislation since the passing of the Act of 1695, the law of arbitration has been gradually matured, through a long progress of forensic discussion and judicial decision, until it may now be regarded as being, to a great extent, a well-digested code, which, in point of solidity and consistency, may probably bear comparison with any other branch of Scottish municipal jurisprudence.

The persevering efforts of the British Legislature to induce a resort to arbitration in disputes between masters and workmen have been already noticed. The legislative provision for introducing a system of references for both Scotland and England, which contains a large infusion of the compulsory element, in regard to certain questions between private individuals and railway companies, etc., will be considered hereafter.[1] But it should also be mentioned here, that an experiment of an interesting character, for the purpose of engrafting the benefit of arbitration upon one important department of the procedure in Courts of law, was lately made in the statute 13 and 14 Vict. c. 36, which was framed by the late Lord Rutherfurd. The object of the statute was to make "further regulations for expediting the business of the Court of Session;" and, upon the special narrative that it was "expedient to extend the benefits of arbitration," provision was made (sec. 50) to enable the parties, by mutual consent, in any cause before the Court of Session in which an issue was to be tried, to have it tried

[1] *Infra:* Statutory Arbitration (Bk. vi. chap. xiii.)

before one, three, five, or seven arbiters, sworn and sitting as a jury. It was declared that the sole arbiter,—or, where there were several arbiters, a majority of their number,—should have all the powers of a unanimous jury. It was apparently intended by this means to afford one method of supplying what is still so much wanted in jury trial; the power of selecting a tribunal, composed of persons who are specially fitted, by experience or otherwise, for dealing with the particular question to be tried,—such as a jury of merchants to try a mercantile question arising among partners; or the like. But it is understood, that the contemplated statutory tribunal has not hitherto been brought into active operation; and that in any case in which the parties to a cause were inclined to have recourse to arbitration, they have done so, out and out, according to the forms which were in use prior to the statute in question. The clause remains, however, as an enduring record of the high value which a great Master of jurisprudence, and an enlightened Reformer of the law, ascribed to the process of arbitration, even in a very modified form, as a means of improving the dispensation of justice; and of his expectation that it would yet be rendered more and more extensively available towards that end.

Perhaps some further aid might still be usefully given by the Legislature to the present system of arbitration at common law. The subject, however, is one of great delicacy. But, looking to the large amount of property which is annually submitted to the determination of arbiters in the chief mercantile cities of the kingdom, it would be a matter of great benefit to the community, if such a measure could be devised as would provide against some of the hazards of miscarriage to which submissions are now exposed; at the same time that it did not derogate in any respect from the freedom of the arbiter's action, as an equitable judge, untrammelled by fixed forms of process, presiding over an amicable tribunal, in the exercise of a private and voluntary jurisdiction, which, while kept within its own limits, is wholly beyond the review of Courts of law.

PLAN OF THE TREATISE.

In treating of the Law of Arbitration, the following subjects will be considered in their order :—

Book I.—The Contract of Submission.

Book II.—The Parties to the Contract; and the subject-matters which may competently be submitted.

Book III.—Arbiters and Oversmen; their Powers and Duties in the conduct of a Submission.

Book IV.—The Award, or Decree-Arbitral.

Book V.—The Judicial Reference.

Book VI.—Various detached subjects in Arbitration Law, which are not considered under any of the preceding heads.

An Appendix will contain some examples of those styles of Submissions and Awards, and other relative procedure in the course of an Arbitration, which are in ordinary use.

BOOK I.

THE CONTRACT OF SUBMISSION.

CHAP.
I. The Nature and Object of the Contract of Submission, viewed as at Common Law, independently of the 25th Enactment of the Articles of Regulation 1695.
II. The 25th Enactment of the Articles of Regulation 1695.
III. The Constitution of the Contract of Submission.
IV. The Construction of the Contract of Submission; more especially with regard (1) to the most common Styles of the Contract; and (2) to the scope and application of the submission-clause, used as ancillary to another and primary contract.
V. The peculiar Rule in Arbitration Law which prevents the enforcement of an agreement to submit, unless the arbiters be *named* in the agreement; and the limitations of that Rule.

CHAPTER I.

THE NATURE AND OBJECT OF THE CONTRACT OF SUBMISSION, VIEWED AS AT COMMON LAW, INDEPENDENTLY OF THE 25TH ENACTMENT OF THE ARTICLES OF REGULATION 1695.

1. In entering upon the law of Arbitration, it is material to consider, First, the true scope of the Contract of Submission, viewed as a simple contract at common law; and as involving certain inherent and implied conditions, which qualify the obligation undertaken by the parties-submitters, to implement the Arbiter's award. And, Second, the precise province which belongs to the 25th enactment of the Articles of Regulation, 1695; so that while that enactment is applied, to its full legitimate extent, in fortifying an arbiter's award, it may at the same time be confined within its own proper province. These two subjects have an important bearing upon each other, and will therefore be taken consecutively. And first, as to the scope of the Contract of Submission at common law.

2. It is a fundamental principle in the law of Submission, that it is essentially based on *contract*.

"A Submission is truly a Contract, entered into between two or more parties who have debateable rights or claims against one another,

by which they refer their differences to the final determination of an Arbiter or Arbiters, and oblige themselves to acquiesce in their decision."[1]

"Every word contained in the Submission, is truly but a *contract* between the parties."[2]

"All the authorities agree that a Submission to Arbiters is a *contract* by which the parties commit to the entire and exclusive cognisance of the Arbiter or Arbiters named, the whole matters submitted, and bind themselves to abide by his or their decision in all things."[3]

3. Arbitration procedure being thus based on contract, it is important, *in limine*, to ascertain, as far as possible, the true *nature and object* of the contract. This will often lend material assistance in the just appreciation of decisions in arbitration law; and it is the more requisite, because the proper character of the contract, at least in earlier times, was often overlooked in Courts of law, and awards were consequently overturned, in plain breach of the agreement of the parties.

4. The evident and leading object of the contract, is to exclude a court of law from the determination of some matter which is in dispute; and to take, in its place, the judgment or award of some private person or persons, selected by the parties to arbitrate between them.[4] This is so emphatically true, that in so far as any subject is included in a pending submission, or in a valid agreement to submit, it is thereby, *ipso facto*, excluded from the cognisance of a court of law, in any action between the same parties: insomuch that the existence of the submission, or of the agreement, is recognised as a good preliminary defence against the action.[5]

[1] 4 Ersk. 3. 29.

[2] Per L. Cranworth, C., in Lang, May 8, 1855, 2 Macq. 95.

"Est autem Compromissum, conventio, quâ litigantes, adjectâ certâ pœnâ, promittunt se parituros sententiæ Arbitri qui hoc negotium in se recipit."—Poth. ad Pand., L. 4, t. 8, Sectio I.

[3] Per L. Moncreiff, in Brakenrig, Dec. 17, 1841, 4 D. 283.

[4] In order more effectually to insure the finality of an award, it would appear, in early times, to have been occasionally the practice to take the parties "*sworn* and oblist in the compromit, to stand at the decreet-arbitral to be given, etc."—Balf. Arb. 415.

[5] "I take the case of a matter being under submission, by regular deed, which completely bars the second trial and prosecution of the matter before any other tribunal."—Per L. J. Clerk, Hope, *arguendo;* in Hawkins, Mar. 9, 1842, 4 D. 944. See also Macgrowther, May 17, 1828, 6 S. 825; M'Caul, Mar. 1, 1831, 9 S. 522; Robertson, Jan. 22, 1835, 13 S. 289; Stewart, Nov. 30, 1839, 2 D. 167; Campbell, Mar. 7, 1835, 13 S. 641; Phipps, Mar. 11, 1843, 5 D. 1025; Turnbull, Feb. 9, 1858, 20 D. 514; M'Donald, June 16, 1829, 7 S. 765; as explained by L. J. Clerk, Hope, in Hawkins, *supra;* Tenants of Dennie, Dec. 5, 1583 (632).

But as this defence is, in its own nature, preliminary, it may be irrevocably waived by a defender, if he shall pursue a course of pleading which is incompatible with it.—Paul, Jan. 5, 1859, 21 D. 206.

5. So entirely does the procedure under a submission oust the jurisdiction of a Court of law, that an award which is pronounced under it affords as good a plea of *res judicata*—to bar any subsequent judicial discussion of the same question, between the same parties—as if it had been a decree pronounced[1] in a Court of law.

6. To attain the great object which the parties have in view, it is plainly essential that they should firmly bind themselves to abide by the arbiter's award and to implement it. Accordingly every regular Deed of Submission contains such an obligation in express terms. What then is the true and legitimate scope of *this obligation*—viewed as mere matter of contract at common law between the parties?

7. In the first place it cannot mean that the parties shall only be bound by the award in so far as the same shall be held, upon review in Court, to be well-founded in *law;* nor only in so far as it shall be held, upon review in Court, to be well-founded in *justice.* If the obligation merely meant either of these things, it would follow that, at the end of any process of arbitration, however long and expensive, the defeated party might submit the award to the review of the Court, *on its merits.* In other words, the award would have settled *nothing;* and the whole questions falling under the submission would have to be tried over again in Court, and to await the decision of the Court.

8. Such a course of proceeding, if admissible, would render the contract of submission purely nugatory and inept. It would be a piece of idle curiosity, and nothing more, to ascertain an arbiter's opinion and take his judgment on a disputed matter, if either party could afterwards, at his pleasure, have that judgment reviewed on its merits in a court of law. The forum of the arbiter would then be converted into a mere ante-chamber to the Courts of Law, serving no other purpose except that of creating great extra expense and delay, without any rational or intelligible motive whatsoever.[2]

9. It would appear therefore to be evident, that according to the fair understanding and intention of both parties, at entering on the contract of submission, they agree to shut out all review by Courts of Law, on the *merits* of the award, whether as regards law or justice.

[1] Fraser, July 29, 1850, 7 Bell's App. 171.

[2] "Indeed the sustaining that ground of reduction (injustice or iniquity) would not only be repugnant to the nature of a reference, but would render decreets-arbitral of little use; since, when they do not *destroy the very seeds of a law-suit, their most valuable purpose is frustrated.*"—4 Erak. 3. 35.

"What can be more obvious than that to reduce a decreet-arbitral for iniquity, is, in effect, to hold that *a submission is not binding?*" "When parties agree to be bound by the opinion of an Arbiter, *his opinion*, even when erroneous, *must be the rule.*"—Kames' Eluc., Art. 40.

"Stari debet sententiæ Arbitri quam de re dixerit, sive æqua sive iniqua sit; et sibi imputet qui compromiserit."—Dig. L. 4, t. 8, sec. 4; Art. 2, sec. 40.

In the words of L. Campbell, when stating the motives which influence parties to resort to an arbiter, "They think that he will dispose of the matter more satisfactorily than the regular tribunals of the country—more economically perhaps and more expeditiously :—and that there may be no appeal to the Inner House, or to the House of Lords, they therefore select him as their Judge, and *his judgment is to be final.*"[1]

10. In thus resorting to arbitration, the parties of course know beforehand that their selected arbiter, like any other mere man, *may err* in judgment, regarding the view which he shall take of the facts, or of the law, of the case; or that he *may err* in judgment, regarding the view which he shall take of the justice of any of the claims brought before him. No arbiter, by accepting his office, comes under any undertaking towards the parties that he shall be exempt from such error: and both parties know that he comes under no such obligation. But, knowing this, the parties nevertheless deliberately agree that they shall be bound by *his* award. And it would be in plain breach of this agreement, if they could afterwards subject that award to the review of a Court of law, upon the ground of an alleged error of judgment committed by the arbiter in pronouncing it. For then the parties would come to be bound, not directly and immediately under their contract, by the judgment of their own arbiter, but only ultimately and contingently (in the very face of their contract) by the decision of a Court of law, whether ratifying or reducing the arbiter's award.

11. But while it forms no part of the contract of submission at common law, that the parties are only to be bound by the award, in so far as it shall be approved in law and equity upon review by a public Court, yet it clearly appears to be an *implied condition* under the contract, that they shall only be bound by it if it be pronounced with *honesty* and *impartiality* by the arbiter. To that extent, both of the parties-submitters implicitly rely that the arbiter comes under an unqualified obligation towards them, by the very act of his accepting the *judicial office* of arbiter between them. To that extent, the arbiter himself must be aware that, by necessary implication, though not in express words, he becomes bound towards both parties, as regards every one act which he shall perform in the exercise of the office and trust which he has undertaken.

12. By the invariable style of an award, the arbiter prefaces the delivery of it with the solemn declaration, that, in doing so, he has "God and a good conscience before his eyes." This remarkable style, which distinguishes an Award from all other Writs, affords in itself no immaterial testimony to the understanding of all concerned, that

[1] Mackenzie, Mar. 9, 1843, 2 Bell's App. 55.

it is only in implicit reliance on his honest impartiality that the parties have clothed him with the office of their arbiter, and that it is only on his undertaking to be honest and impartial that he assumes the functions of that office. But although no such appropriate style had existed, it is nevertheless clear, that such an undertaking on the part of the arbiter towards the parties, is, at common law, an essential and fundamental condition, qualifying the obligation of the parties to implement his award.

13. It is avowedly in the character of a *private Judge* that the arbiter is resorted to by both parties. The office which he undertakes is, in its own inherent nature, a judicial function,[1] viz., that of determining how much of the claim of either contending party is, in his opinion, justly due. In accepting, and undertaking to perform, such an office, an arbiter as unqualifiedly obliges himself to act with honest impartiality as if he had subscribed the most express words of direct obligation to that precise effect. Where the parties therefore bind themselves, in the contract of submission, to abide by his award, they must, by necessary implication, be held to do so only in the unqualified reliance, and on the implied condition, that the award shall be honestly and impartially pronounced. It is in truth as unnecessary to stipulate, in express words, that the award shall only be binding if honestly and impartially pronounced, as to stipulate in express words that it shall only be binding if pronounced by the arbiter while in a state of mental sanity.

14. The just effect of this *implied condition*, viz., the honesty and impartiality of the arbiter, becomes therefore a necessary element to be taken into account, in determining the validity of any award at common law. In so far as regards the single element of *honesty*, it would seem to be satisfied wherever the arbiter had conscientiously believed he was doing what was right and just, however much he might have erred in judgment. But more than this is required to satisfy the element of *impartiality*.

15. Actual and positive impartiality includes within it, not merely an honest purpose of mind, but *equal and even-handed procedure towards both parties alike*. Accordingly, where procedure has been followed by an arbiter, which, in essential matters, is *fundamentally incompatible with impartiality*, it will be found that, however honest may have been the arbiter's intention, his award has been set aside: and this, in many cases, without any warrant whatever from the words of the Act of Regulations 1695, but solely upon the sound construction of the pure contract of submission itself.

[1] "Arbiters, by whomsoever named, ought to be perfectly indifferent between the parties, and owe to the particular parties duties of the same nature as those which the King's Judges owe to his Majesty's subjects in general, though not named by them."—Per L. Eldon, in Maule, May 10, 1814, 4 Dow 380.

16. Thus, for example, it is quite conceivable that an arbiter who had perfect confidence in the well-known honour and integrity of both of the parties, and who had heard an explicit statement of the facts of the case from *one* of them, in the accidental absence of the other, might honestly believe himself to be sufficiently informed to enable him to make up his mind and give judgment without hearing the other party at all. But although such an arbiter might be acting with unimpeachable *honesty* of purpose and intention in so giving his award, he would certainly not be acting with *impartiality and equality* to both parties alike. Impartiality by an arbiter, who is placed between two contending parties, necessarily includes in it *an equal and even-handed procedure towards both alike.* An arbiter therefore, to be actually impartial, must not hear *one* party only; if he hears the one, he must hear the other also, or give him, at least, the opportunity of being heard. He must not lead evidence in the presence of *one* party only, but of both; or at least after due notice given to both.[1] He must, in short, follow such procedure as is *not*, in essential matters, fundamentally incompatible with even-handed equality to both sides alike; or else *a tacit but essential condition* of the contract of submission is violated, and his award will be reducible as being unfit to bind either party, because it is not within the true scope of that legal obligation to abide by the arbiter's award, which alone the parties granted under the contract.[2]

17. In the cases which have just been supposed, awards would be reducible at common law, and have been so reduced; just because a breach of the arbiter's obligations under the contract of submission had been committed by him, by departing, in essential particulars, from that impartiality and equality of procedure which is, at common

[1] Sharpe, Feb. 24, 1815, 3 Dow 102; Heggie and Co., Feb. 1, 1825, 3 S. 339; Earl of Dunmore, Jan. 28, 1835, 13 S. 356; Earl of Hopetoun, Mar. 9. 1859, 21 D. 782 (3d Issue); Opinions in Mitchell, June 17, 1848, 10 D. 1297. [The arbiters, however, if men of skill, may, in certain circumstances, decline to hear the parties. Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271; Mackenzie *v.* Visct. Hill and Tennant, June 2, 1868, 40 Jur. 499.]

[2] An arbiter's powers "are not in all points absolute; because there are some *implied obligations* on the arbiter, as strong as if they had formed the subject of express provision in the submission itself, and any breach of them will necessarily expose the award to challenge."—"There is this limit to his powers, viz., that he shall do strictly equal justice between the parties—that he shall not allow to the one that which he denies to the other. For the condition of the equal footing on which the parties stand, and of their equal rights to inform the arbiter's mind, seems to me *a necessary implication in the whole transaction.*" "If he hears one party, he cannot refuse to hear the other," etc.—Per L. Fullerton, in Mitchell, June 17, 1848, 10 D. 1297.

"An arbiter is bound to show this Supreme Court that he has dealt *fairly*, that is *equally*, with both parties. Otherwise it must be held that he has *violated the contract of submission*, and acted *ultra vires compromissi.*"—Per L. Jeffrey, *Ibid.* 1309.

law, an implied condition in the undertaking of the arbiter towards both parties, in every such contract. Though the decisions in question are dated subsequently to the Act 1695, all these reductions must have been sustained at common law, and independently of that Act; for the Act introduced no new ground of challenge; it merely cut off certain grounds of challenge which had previously been allowed.

18. An interesting exposition, throwing light on this department of the law of arbitration, was given by Lord Eldon, in the well-known case of Sharpe, which will afterwards be more fully noticed. But it may be mentioned here, that in that case, an arbiter held it requisite for the due performance of his own judicial functions, to obtain from both parties an admission that they had nothing further to state, before he proceeded to make up his mind and give judgment. One of the parties lodged in process a written admission to that effect. The other party (Sharpe), conceiving that he had important evidence still to adduce, had lodged no such admission. By a mistake of the clerk to the submission, the arbiter (whose honesty and integrity were unimpeachable) was led to believe that *both* parties had lodged the admission in question. He was therefore erroneously induced to consider that perfect impartiality of procedure towards both had been observed, and that, as nothing more was to be brought before him, he was warranted in proceeding to make up his mind and give judgment. He accordingly did so, and narrated in the award (what he fully believed to be the fact) that *both* parties had lodged a written admission that they had nothing further to offer. Sharpe brought an action of reduction, in which the Court of Session sustained the award, in respect that none of the three grounds of reduction applied, which were specified in the Act of Regulations 1695. This was undoubtedly true. Nevertheless, in the House of Lords, the judgment was reversed, and an opinion was delivered by Lord Eldon which expressly disclaims all support from the Act of Regulations, and which *must therefore be based upon the essential and inherent conditions of the contract of submission itself, at common law*, as affording ground for setting aside the award. L. Eldon observed: "The question was, whether—if the arbitrator was of opinion that he ought to have the admission of parties that they had nothing further to offer, and that they desired a decision upon the case, as it stood—and he expressed that opinion on the face of the award, and that the parties had stated they had nothing further to offer—apprehending that he had their admission to that effect when he had it not, and the circumstance was material—any Acts of Sederunt, Regulations, and proceedings of Court, ought to prevent the award from being impeached; they who said that the award could not be impeached, *contending that an arbitrator might say that one party should be heard throughout, and the other not at all; for to that extent the argument must in principle be pushed.* But his

opinion was, that, *by the great principle of Eternal Justice,* which was prior to all these Acts of Sederunt, Regulations, and proceedings of Court, *it was impossible that an award could stand where the arbitrator heard one party, and refused to hear the other;* and on this great principle, and on the fact that the arbitrator had not acted according to the principle upon which he himself thought he ought to have acted, even if he had decided rightly, he had not decided justly, and therefore the award could not stand."[1]

19. Though this Opinion seems to be expressed with more of warmth and eloquence than are usually allowed to appear in the deliberations of the Judgment-seat, it merely resolves into this most salutary legal doctrine, that, apart altogether from the Regulations 1695, if the procedure of an arbiter shall be *fundamentally incompatible with impartiality towards both parties alike,* in regard to vital matters, such as the allowance of hearing, or the leading of proof—his award cannot stand; and the parties are, simply, *not bound to implement it,* according to any sound interpretation of their mutual obligations under the contract of submission at common law.[2]

20. It would appear therefore to be established, both on principle and by authority, that it is an inherent, though merely implied, condition of the contract of submission, that an arbiter shall act in all essentials with impartiality towards both parties alike, otherwise the award made by him shall not be binding: and further, that although mere purity of heart and intention, on the part of the arbiter, may suffice to satisfy the condition of his acting *honestly,* something more than this is involved in his acting with positive *impartiality.* To satisfy this latter condition, there must be equal and even-handed procedure towards both parties alike; at least there must be nothing which is, in essential particulars, incompatible with such procedure; no hearing of one side only (for example) and refusing to hear the other. Because any such departure from impartiality by an arbiter is in violation of his undertaking towards the parties, according to the true import of the contract of submission; it is emphatically *ultra vires;* and the party injured is entitled to reduce the subsequent award at common law.

21. Wherever an arbiter violates any essential conditions, whether express or implied, under which he holds his office, he necessarily acts *ultra vires,* and an award, founded on such procedure, is reducible at common law. In this respect the case of Sharpe is merely an illustration of a general rule. It is immaterial whether the conditions, so violated, be express or implied. In the former case, the evidence of their existence lies on the surface; in the latter, the evidence lies

[1] Sharpe, etc., Feb. 24, 1815, 3 Dow 102.

[2] See also Mitchell, June 17, 1848, 10 D. 1297; and Shaw, 22 Feb., 1817; excerpt from Note Book of L. J. C. Boyle, in Park. Syn., xxiii. 72.

deeper, and has to be sought for. But in both cases alike, as soon as it is proved that the conditions, whether express or implied, *are there*, the arbiter's procedure, in transgression of them, is *ultra vires*.[1]

22. Besides the conditions which qualify the relations of the arbiter with the parties, under the contract of submission, there are also implied conditions which essentially qualify the mutual relations of the parties towards each other, and which last cannot be violated by either party without freeing the other from his obligation to abide by the award so obtained. For example, the parties enter into the contract, in reliance that reciprocal fairness of procedure shall be observed by each of them in the conduct of the submission; and that each shall abstain from practising any fraudulent and deceitful devices on the arbiter, for the purpose of thereby impetrating from him an unjust award, pronounced under essential error, so induced. Though no such reciprocal obligations are expressed in any submission, they are always inherently implied; as no man could contemplate to bind himself in favour of his opponent, to abide by an award so obtained by that opponent. Accordingly, where a party, in violation of this implied obligation, obtained an award which greatly overvalued certain lands, in consequence of false evidence, fraudulently concocted by him and laid before the arbiter, the Court reduced the award.[2]

[1] An instance of the invalidity of an arbiter's procedure, as soon as it was proved to be in violation of such a condition, although the condition was not expressed in the submission, will be found in Halley, etc., July 9, 1833, 11 S. 942.

[2] Logan, Nov. 15, 1798, F. C. The value of certain lands was submitted to an arbiter by a purchaser and seller. The seller had procured an offer for a lease of the lands for 19 years as a bleachfield, at a much higher rent than the land was worth, by representing to the intending tenant, that it possessed the command of a certain supply of water, which it really had not. Knowing that the estimated rent had been thus falsely enhanced, he produced in the submission the offer for a lease, as a fair test of the market-value of the land. The arbiter specially relied on it, as such, in making his award. The true history of the offer of lease being afterwards discovered, a reduction of the award was brought by the purchaser, as having been impetrated by fraud. The defender pleaded that by the Regulations 1695, the award was unimpeachable; which was undoubtedly true. He further pleaded that it could not be reduced on any grounds except those specified in the Regulations. Nevertheless the award was reduced at common law. The interlocutor of the Court articulately set forth the fraudulent devices practised by the defender, which were allowed to go to proof, before answer; and on being proved, the award was reduced.—See observations on this case by L. J. Clerk Hope, in Miller, Mar. 10, 1855, 17 D. 713.

To the same category may be referred the first of the two Issues, granted by the Court in M'Phersons, June 23, 1831, 9 S. 797, viz.: "Whether, by fraud and deceit practised by the defender, the said oversman was induced to pronounce the decreet-arbitral?" On this issue, it was lately observed by L. Deas, in Miller, *supra*: "It seems to me to afford an instance of a ground of reduction, not under the Article of Regulation at all; and to be framed upon the footing that *reduction*,

This rested necessarily on the common law, as the conduct of the arbiter himself had been unimpeachable, and was open to no challenge on the Regulations 1695. And in another case, where the grounds of challenge were of a weaker character, yet as one of the parties had impetrated the award from the arbiter *obreptione*, or by undue agency, the Court reduced the award,[1] equally without any aid from the Act of Regulations.

23. It would thus appear that, according to the true nature of the contract of submission, there are important conditions *implied* in the undertaking of the arbiter towards the parties, which he cannot violate without acting *ultra vires*; and further, that there are important obligations which the parties *impliedly* undertake towards each other, which neither party can transgress without setting his opponent free from all liability to abide by the award.

24. The contract of submission has never, in Scotland, been held *revocable* at the will of either party singly; but of course it may be revoked and annulled, *quandocunque*, by the concurrence of both parties together. Being a mutual and onerous contract, and the object of it being to obtain a binding and final decision, which must, in the great majority of instances, occasion much disappointment to one at least of the parties, it is difficult to understand how it should ever have been regarded, in any country, as continuing revocable at the pleasure of either party, up to the date of the award. This seems, on the contrary, to be incompatible with the fair or beneficial working of the

in respect of the conduct of the parties, in violation of the implied conditions of the contract of submission, is not affected by that Article."

It may be noticed that, in England, "an award may be set aside, if either party is guilty of fraudulent concealment of any matter which he ought to have disclosed, or has wilfully misled or deceived the arbitrator."—Russ. 655, [4th ed., 654].

See an award reduced in respect of fraud practised by one of the parties against the other. Deas, May 25, 1821, 1 S. 29. See also Hercules Insurance Co., Dec. 12, 1835, 14 S. 147.

[1] Calder, Feb. 1, 1837, 15 S. 463.

In this case, L. Mackenzie observed: "It is certainly a very difficult thing to open up a decreet-arbitral; but it would be a very serious thing for the country if a decreet-arbitral which had been obtained by unfair means could not be set aside." There was no imputation upon the arbiter. It merely appeared that after very considerable discussion before him, an award had eventually been impetrated from him by nimious conduct on the part of one of the agents, which was characterised by the Court as amounting to "erroneous, and substantially incorrect and improper agency;" insomuch that the award was held to have been obtained "*obreptione*."

It may here be noticed, that, in a case, happily of rare occurrence, in which the arbiters and one of the parties conspired together in concocting a fraudulent award, the Court not only reduced the award, "and found the arbiters liable in expenses and damages, but also fined and imprisoned them for eight days."—Dalgliesh, Jan. 29, 1742, Elch. Arb. 7. See also entry in Books of Sederunt of the Court, under the date of 29 Jan. 1742. Such an award was, of course, reducible *both* on the Act of Regulations and at common law.

system of arbitration. In most cases, the parties have occasion to appear repeatedly, and sometimes frequently, before the arbiter at different stages of the procedure. Ample opportunity is thus necessarily afforded of observing the tendency of his views, and the nature of the impressions which are made on his mind as the discussion proceeds. And therefore, if the submission remained revocable, the frequent result must obviously be, as until lately it was found in England to be, that a party "having gathered that the opinion of the arbitrator was hostile to him, immediately revoked his submission."[1] This defect has lately been, in great measure, cured in England by the Statute 3 and 4 Will. IV. c. 42, sec. 39.[2] It never found admission into the law of Scotland.[3]

25. According therefore to the true nature and object of the contract of submission, at common law, when duly examined, it would appear—

(1.) That it is the leading object of the contract to have some

[1] Russ. 154, [4th ed., 144].

[2] Perhaps it may be proper to quote here, in words of authority, both the law of England on this subject, and the *ratio* assigned for it. Mr. Russell, the latest English writer on the Law of Arbitration, makes the following statement, in his valuable work :—"At common law, the authority of the arbitrator might, at any time before the award was made, have been revoked at the pleasure of any party to the submission." And this could be done, "*notwithstanding it was made irrevocable by the express words of the submission;* for nothing under a legislative power could make *that* irrevocable which was in *its nature* revocable ; for, the arbitrator being constituted and put in the place of the parties, by their consent to act for them, could no longer act than he had such consent ; and any award made, subsequent to a revocation, was a mere nullity."—Russ. 149, [4th ed., 140].

Apparently therefore, no men could, even by the most express words and formal deed, make an irrevocable agreement to authorise their own selected arbiter to decide for them. It is impossible to avoid suspecting that such a doctrine must be rested upon some subtlety, of a character too refined for common use. The party however who committed a breach of the submission by revoking, could apparently be proceeded against as for contempt of Court, or for damages, according to circumstances ; unless he could show sufficient ground for the revocation, in respect of the arbitrator's misconduct.—Russ. 153, [4th ed., 143].

It may be interesting to quote the opinion of L. Cranworth, C., on this rather remarkable feature in the English law of arbitration. His Lordship observed that, prior to 3 and 4 Will. IV. c. 42, "if parties submitted a matter for arbitration to a private tribunal, to be decided by a selected person, *either of them might, at any time, without assigning any ground, revoke that submission.* That was an inconvenient, and I think I may be allowed to say, an irrational state of the law."

"Now the law may be represented as being, that neither party to a submission can stop an arbitration, pending its proceedings, without first obtaining the sanction of some Court at Westminster Hall, or of one of the Judges for so doing."—Drew, Mar. 8, 1855, 2 Macq. 3.

[3] The wide distinction which, in many important particulars, has always separated the law of England from the law of Scotland, should be carefully kept in view, in considering arbitration law. See on this subject L. Campbell in Mackenzie, Mar. 9, 1843, 2 Bell's Appx. 55.

question or difference settled; and settled *finally;* without allowing recourse to a Court of law.

(2.) That, for attaining this end, the parties agree to submit their difference to one or more private persons as arbiters; and firmly bind themselves to abide by their determination or award.

(3.) That as arbiters, however well selected, are necessarily men of fallible judgment, and liable to error like all other men, the parties who, in the full knowledge of this patent fact, nevertheless bind themselves to abide by a fallible arbiter's award, do intend thereby to bind themselves to refrain from challenging his award on any ground of mere error in judgment. Any reservation of a right of challenge upon such a ground is wholly incompatible with an obligation to hold a human arbiter's award as final.

(4.) That the obligation to abide by an award necessarily implies at common law, and is qualified by the condition, that the award shall be pronounced by the arbiters in conformity with their powers under the contract of submission; and without violating any fundamental duty, owing by them to the parties, under the contract; such, for example, as that of acting with honesty and impartiality to both parties alike.

(5.) That the obligation to abide by an award further implies at common law, and is qualified by the condition, that the said award shall *not* have been procured by either of the parties by means of violating any fundamental duty which he owed to his opponent in the conduct of the submission; as, for example, by practising fraudulent devices upon the arbiters, so as to induce them, under the influence of imposition, to pronounce their award.

(6.) That consequently an award which is pronounced by arbiters, in excess of their powers under the contract of submission, or in violation of their fundamental duties in the conduct of a submission, is not such an award as the legal obligation of the parties, under their contract, bound them at common law to implement.

(7.) That consequently, in like manner, an award which is procured from an arbiter by means to which one of the parties has resorted, in violation of his fundamental duty towards his opponent in the conduct of the submission, is not such an award as that opponent is bound by the contract, at common law, to implement. And,

(8.) That in the instances above specified, the obligation to abide by the award is reducible on the ordinary principles of the law of contract, independently of the Act of Regulations 1695.

CHAPTER II.

THE 25TH ENACTMENT OF THE ARTICLES OF REGULATION 1695.

26. In endeavouring to estimate the legitimate extent to which the 25th Enactment of the Articles of Regulation, 1695, protects an award against reduction, it will materially assist the inquiry, if the precise evil which the Act was designed to remedy be distinctly ascertained in the first instance. This may be stated to be, the power which the Court had usurped (in violation of the contract of parties), of reviewing awards upon their merits, whenever a case of apparent injustice occurred, such as, in the discretion of the Court, seemed to call for their interference. On this subject there is a pithy observation by L. President Blair, in a case in which an attempt was made to set aside an award, *inter alia*, in respect of alleged injustice committed by the arbiter. "As to the alleged injustice—we have nothing to do with it—it is excluded by the very nature of a submission, which is for decision without appeal. For the Court of Session to meddle with decrees-arbitral, was an abuse—and corrected accordingly by Commission in 1693, and the statute."[1]

27. It is not, perhaps, very difficult to see how this abuse, in early times, crept into the practice of the Court. It must have occurred, from time to time, that awards were pronounced in which the arbiter, from an error in judgment, had greatly failed in point of justice to the parties. In such cases, when the losing party brought the award under challenge in a Court of law, there could scarcely fail to be a strong desire in the breast of the Judge to set aside the peccant award, if possible, and to give redress to the suffering party. In these circumstances, and especially with reference to the looseness of the court-procedure of the times, it is easy to see how instances might occur, in which awards were set aside for "iniquity" or injustice; and if once a precedent was made, in such a matter, it is evident that the practice had every tendency to spread and grow inveterate.

28. It should also be observed that traces are not wanting, even in comparatively modern times, of cases in which the Courts of Law have shown a spirit of an unfriendly kind towards Arbitration, which might almost have been thought to savour of jealousy towards a rival forum, were it possible for a high public tribunal to be influenced by such a feeling.[2]

[1] Note on Baron Hume's papers in Kirkcaldy, June 16, 1809; quoted by L. J. C. Hope in Mowbray, June 2, 1848, 10 D. 1113. See also 4 Ersk. 3. 35.

[2] See for example the strain of L. Eldon's observations, in Street, April 30, 1802, 6 Vesey 814. It had been stipulated in articles of copartnery, that all disputes between the partners were to be referred to arbitration. One of the partners filed a Bill in Chancery against the other, who pleaded the above agreement in bar

29. From these, or other causes, it had resulted in point of fact, that prior to the Act of Regulations, the Courts of law were in the practice of holding themselves entitled to review an arbiter's award,

of the action. L. Eldon, in overruling the plea, observed, *inter alia:* "This Court has given credit to itself, as likely to decide as well as arbitrators; and it requires a strong case to deprive a person of the right to a decision here."—"I recollect passages in which Courts of justice, however full of *eulogia* upon these domestic forums, have recollected their own dignity sufficiently to say, they would not be ancillary to these forums," etc.

See also the strain of pleading in Buchanan, June 25, 1799 (14593). Partners had agreed in their contract of copartnery, to submit their disputes to arbitration before the Chairman, etc., of the Glasgow Chamber of Commerce: but they had not named individual arbiters. An action being raised by one of the partners, it was met by the defence that the agreement to submit excluded legal procedure. The pursuer, in successfully combating this plea, urged, *inter alia*, that "it was even *contra bonos mores* for parties to tie themselves up from having recourse to the established courts of justice, which indeed, if such clauses were supported, might be in a great measure superseded by the Chamber of Commerce, and a new jurisdiction created, which would be neither constitutional nor expedient."—In support of this argument the pursuer put the rather strong supposition—What if all Glasgow should bind themselves to submit their disputes for twenty years to come, to arbitration? Would that be valid? etc.—Among the Observations on the Bench, at the advising, one was to the effect that "supporting such clauses would virtually create a new Court." [See also Elgin Lunacy Board *v.* Bremner and Elder, July 10, 1874, 1 R. 1155, and June 24, 1875, 2 R., H. L., 136. In that case the reference of a *past* dispute to a private corporation, of which no individual members were named, was held void by the Court of Session as having been made to an uncertain person, but was sustained by the House of Lords. As the grounds of judgment would seem to apply equally well to a similar reference of *future* disputes, they somewhat impugn the Scotch doctrine as to *delectus personæ* and specific nomination. See also note, section 145.]

But in a very recent case, authoritative observations have been made which place the antipathy of some of the Courts of Law to arbitration, in former times, in a very strong light. In Scott, July 10, 1856, 25 L. J. (Exch.) 308, the question was raised whether a certain condition, inserted in the policies of a Mutual Assurance Coy., binding the members to submit their differences to arbitration, was illegal in respect that it ousted the jurisdiction of the Courts. The question received great consideration, and created much difference of opinion among the Judges. When it reached the House of Lords, L. Campbell, C. J., after remarking that there were no grounds of public policy on which the agreement was objectionable, proceeded to say that the plea of the impolicy of ousting the jurisdiction of the Courts, in cases like the present, "had its origin in the interests of the Judges. There was no disguising the fact, that, as formerly the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall for the division of the spoil. And hence the disputes between the different Courts about a *latitat*, a *capias*, and a *quo minus*; the *latitat* bringing business into the Court of Queen's Bench; the *capias*, into the Court of Common Pleas; and the *quo minus*, into the Court of Exchequer. And they *had great jealousy of arbitrations*, whereby Westminster Hall was robbed of these cases, which came not into the Queen's Bench, nor the Common Pleas, nor the Exchequer. Therefore they said that the Courts were not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so."

to the effect of reducing it, if they held it to involve iniquity on the part of the arbiter, or enorm lesion to the party.[1]

30. But the great object of parties in resorting to arbitration was, as already noticed, to exclude all Courts of law, and, for that purpose, to accept the arbiter's award as *final*. It followed, therefore, that when the Court nevertheless reviewed awards, upon their merits, when challenged for "iniquity," or injustice committed through a mere error of judgment by the arbiter, they did so in downright breach of the contract of the parties under their submission; thereby, in truth, "holding that a submission was not binding."[2]

31. The necessary effect of this was to deprive the country of the benefit of arbitration. No man could, in such a state of matters, rely on the finality of any award; and except for the benefit of finality, few or no disputants would resort to the process of submission. This was an evil of magnitude; because the amicable forum of the arbiter has been recognised in every civilised country as an important auxiliary in the administration of justice. To cure this evil, all that was necessary was *to restore conclusive finality to the award of an Arbiter, notwithstanding any mere error in judgment:* provided always that his procedure was in conformity to his powers, and to his essential obligations to the parties, under the contract of submission. It was matter of moral certainty that the parties, in entering into the submission, deliberately intended to bind themselves, thus far, to hold his award final[3] and conclusive. It was matter of equal certainty that they did not, and could not rationally, intend to bind themselves further. For men to oblige themselves, under and in virtue of any contract whatever, to abide by what should be done in violation of the conditions on which the contract was entered into, involves a contradiction in terms. To this general observation, the contract of submission forms no exception.

32. The precise remedy required, therefore, was some enactment which should effectually disable Courts of law from disturbing an arbiter's award for any mere error of judgment committed by him; while it left every challenge of the award for an infraction of any essential conditions (express or implied), qualifying the contract of submission, to be dealt with on the ordinary principles of the law of contract. Certainly no such remedy was wanted, as that of making the contract of submission binding, notwithstanding the infraction of some of its essential conditions, express or implied.

33. Various forms of expression might have been employed in framing such a Regulation as would supply the remedy in question.

[1] 4 Erak. 3. 35. "Decreets-arbitral were by our usage subject to reduction on the head of iniquity in the judge, or of enormous lesion to the party, till the Art. Regul. 1695, sec. 25."

[2] Kames' Eluc., Art. 40.

[3] *Supra*, Chap. I.

Perhaps the words which were actually used are very open to criticism. Nevertheless, such as they are, they effectually prohibit Courts of law from intruding into the proper domain of the arbiter, by meddling with his award on account of any mere error in judgment: and it is very difficult to believe that anything more was ever intended.

34. The 25th Enactment of the Articles of Regulation 1695 declares: "That for the cutting off of groundless and expensive pleas and processes in time coming, the Lords of Session sustain no reduction of any decreet-arbitral, that shall be pronounced hereafter upon a subscribed submission, at the instance of either of the parties-submitters, upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood, to be alleged against the judges-arbitrators who pronounced the same."[1]

35. This enactment, which, as already observed,[2] possesses statutory force, supplies a complete remedy for the evil which was to be cured by it. By stating, as the only grounds of challenge which could in future be allowed against an arbiter, the three specific charges of "corruption, bribery, or falsehood," it positively declared that his award should *not* be challengeable for any mere error of judgment on his part. And so thoroughly effectual has the Act been in this respect, that ever since the day when it was passed, no plea of an arbiter's mere error of judgment—apart from all corruption, bribery, or falsehood—has ever once been held relevant to reduce an award.[3]

36. But a difficulty of quite an opposite kind has arisen in applying the Act. It has been founded on as if it excluded all reduction of an award, on any ground whatever, unless it could be proved that the arbiter was guilty either of "corruption, bribery, or falsehood." And certainly, if the Act could be construed without any regard to the nature of the evil which it was intended to remedy, and without

[1] See Act engrossed under its date, in the Books of Sederunt of the Lords of Council and Session.

The words of the Act extend to every award that is pronounced "upon a subscribed submission." It has nevertheless been maintained that there is a class of submissions to which it had no application, there being an essential distinction (it was said) between the submission of a *lis*, or controversy, and the submission of a *negotium*, or bargain not fully adjusted; such as occurs when the parties to a contract of sale make a submission to arbiters (or arbitrators) to fix the price. In the latter case it was contended that the deliverance of the arbitrators, if unjust, was subject to review by a Court of law, and that the Act 1695 did not apply to it. But the Court repelled a plea which was opposed to a long course of constant and uniform practice. Morrison, Mar. 11, 1847, 9 D. 910. See with respect to the case of Robertson, 16 July 1756, 5 Suppt. 852, which was mainly founded on, in support of the above plea, the Session Papers in the Kilkerran Collection, Summer Session, 1756, vol. 24.

[2] *Supra*, p. 13.

[3] [Thus in Welch *v.* Jackson, Dec. 23, 1864, 3 Macph. 303, it was again held incompetent to object that a judicial referee had erred in point of law.]

any regard to those ordinary principles of the law of contract which it could scarcely be designed to overthrow, there is an awkwardness of expression, fitted to afford some countenance to such a plea. But this is not the mode in which Acts can be soundly or beneficially construed, in dealing with the affairs of men. And, on examination, it will be found impossible to allow so extensive and multifarious an exclusion of grounds of challenge as the construction in question would infer.

37. Ever since the date of the Act, there has been a series of judgments, reducing certain classes of awards, in which no allegation whatever of corruption, bribery, or falsehood, was made against the arbiter. For example, the plea of *ultra vires*, or excess of power, has always been held a relevant ground of reduction, although the arbiter had merely committed an error of judgment, and was wholly clear of all other impeachment. This indeed results irresistibly from the fact that every award is *based on contract;* and therefore, there must, in the nature of the thing, be valid ground for challenging it, whenever it goes beyond the contract of submission.

38. The cases, accordingly, are too numerous to be quoted, in which the plea of *ultra vires* has been held relevant to overturn an award, without any aid from the Act 1695. But it has also been seen that, in the several cases of Logan,[1] Sharpe, Macpherson (1st Issue), and Calder, awards were set aside in respect of a violation having been committed of essential conditions, which qualified the obligation to implement an award, at common law. In these cases, none of the special charges under the Act 1695 were brought against the arbiter. In the case of Sharpe, all support from that Act was expressly and even ostentatiously disclaimed in the House of Lords; and in Logan, Macpherson (1st Issue), and Calder, it was as absolutely excluded. These decisions therefore can only be explained upon the ordinary principles of contract law; that the obligation to implement the award, when duly examined, had been held to be inherently a *qualified obligation*—an obligation affected with *conditions* sometimes express, sometimes implied—so that it necessarily failed to retain binding force when such conditions (being material) were[2] violated.

39. To these cases, that of Maule may be added, as affording another remarkable instance in which an award was set aside by the House of Lords upon principles of common law, and without founding on the Act 1695. And it will be observed that every reduction of an award, which is free of all challenge on the Act 1695, is a direct authority against the doctrine that that Act must be held to include every competent right of challenge of an award.

[1] *Supra*, pp. 26, 27, 28.

[2] See also Halley, *supra*, p. 27, note 1, involving the same principle.

40. In the case of Maule,[1] certain litigants agreed to a compromise, which they wished to throw into the shape of a submission and award, by way of fortifying its validity. The compromise embraced matters affecting an entailed succession. Having arranged the matter, parties made a submission to their respective counsel, *Sir Islay Campbell* and *Mr. Wight*, who accepted the office of Arbiters, and within a week, pronounced an award in terms of the pre-concerted agreement of parties. *Ex facie* of the deeds themselves, there was every appearance of a regular submission and a regular award. But many years afterwards, evidence was incidentally discovered which threw light upon the true nature of the transaction, and showed that there had been no true or genuine submission and award. A reduction was brought at the instance of an heir of entail whose interests were affected; but as there was a "subscribed submission," and as the high and unimpeachable personal character of the learned Arbiters wholly exempted them from any imputation of "corruption, bribery, or falsehood," the Court of Session, holding that the absolute terms of the Act 1695 excluded all challenge, sustained the award. But on appeal, L. Eldon, C., while expressly disclaiming "every ground of imputation of the arbiters," held that the transaction was just "an agreement executed *under the colour* of an award:" and added, "I can therefore neither look upon this as a valid submission, nor as a valid Decree-arbitral."[2]

41. These cases appear to show conclusively, that awards are challengeable on other grounds than those specified in the Act 1695; and in particular that they are so challengeable wherever it can be proved that any material condition (express or implied), which qualified the obligation to implement the award, has been violated. It would seem, therefore, that as the Act 1695 *must* be read in some restricted or modified sense, that reading which would confine its operation to the removal of the evil which it was enacted for the special purpose of repressing has many strong claims to be regarded as the truest. By reading the Act as just one mode of absolutely excluding all power in Courts of law to reduce an award on account of an arbiter's mere error of judgment[3] or "iniquity," as it has been

[1] May 10, 1814, 4 Dow 363.

[2] It seems well worthy of reflection, now, to observe how far the application of the Act 1695 must at one time have been stretched, and how rigorously it must have been supposed to exclude all other challenge, when it could thus be successfully pleaded, as at first it was, in defence of the mere spurious counterfeit of an award.

[3] "By this Regulation, a decreet-arbitral obtains its proper effect; for, when parties agree to be bound by the opinion of an arbiter, his opinion, even where erroneous, must be the rule."—Kames' Eluc. 40.

The meaning of the Regulation was "to put a decreet-arbitral upon *its just and true foundation of a mutual contract* which cannot be reduced upon iniquity; in

termed,—by reading it as attaining this end through a declaration that the only available challenge *against an arbiter* shall be the imputation of "corruption, bribery, or falsehood" against him,—and by leaving the contract of submission (and its product the award) to be dealt with, *quoad ultra*, according to the ordinary principles of contract-law,—it would appear that all the decisions, at least of modern times, admit of consistent explanation. It seems to be at least difficult, or perhaps it may be said to be impossible, to find a consistent interpretation of the whole decisions upon any other footing.

42. It must at the same time be admitted that there are many cases, and that there are Opinions of great authority, which assign a much wider scope to the application of the Act 1695, than that which is here pointed at. These cases and opinions almost, if not altogether, ignore the resort to common law in any question of the reduction of an award; holding this to be cut off by the Act 1695. And they have placed numerous reductions within the sweep of that Act, which would not otherwise have fallen within it, by assigning a large and highly elastic signification to the term "corruption," as used in the Act. The other two words, "Bribery and Falsehood," have not received any enlarged signification in consequence of judicial interpretation: but the cases and opinions as to the application of the word "*corruption*" require careful attention.

43. On this subject, the opinions in the case of Mitchell[1] are instructive. The Court held, on the facts, that the arbiter, after allowing both parties a proof, had thought fit to decide the case on considering the proof led by one party, without allowing the other party a fair opportunity of adducing his counter-proof. The Court unanimously set the award aside. There was no imputation made on the arbiter's integrity; and the Court had occasion therefore to express their opinion, whether, in the circumstances, this conduct of the arbiter fell within the constructive meaning of the word "corruption," and so was specially allowed by the Act of Regulations; or whether it involved a breach of the arbiter's essential obligations towards the parties, under the contract of submission, and so rendered his award not binding on them at common law.

44. L. Pres. Boyle observed that he held the word "corruption" to apply to the arbiter's conduct, "when the arbiter has decided on a half-proof, all on one side."

45. L. Mackenzie,[2] "It is impossible to construe the word '*cor-*

place of considering it, as formerly, to be of the nature of a judicial proceeding, which may be reviewed upon iniquity."—"A decreet-arbitral is a mutual contract, and cannot, more than any other contract, be challenged upon iniquity."—Per L. Kames, in Ochterlony, August 8, 1754 (4470).

[1] June 17, 1848, 10 D. 1297.

[2] *Ibid.* 1307.

ruption' strictly, when stated as a ground of reduction of decreets-arbitral." His Lordship added that he did not impute anything malicious, or "dishonourable, or morally wrong," to the arbiter; but that he had, apparently "from impatience," decided the case when it was not in a proper state for decision, and therefore the award was reducible, "under the general term corruption." "It does not mean 'bribery,' for that is expressly mentioned as a *separate* ground of reduction of such decrees. We cannot stop short of holding that it includes any plain failure in duty, distinct from an error in judgment. We are not entitled to set aside the award of an Arbiter pronounced under an error of judgment, however palpable that error may be; but if any *failure in duty* has been committed, distinct from error of judgment—the award cannot stand—that failure must be included under the term '*corruption*.'"

46. L. Fullerton[1] observed that the powers of Arbiters "are not in all points absolute; because there are some implied obligations on the arbiter, as strong as if they had formed the subject of express provision in the submission itself, and any breach of them will necessarily expose the award to challenge. Thus all decisions on the merits of the claims of parties are of course final and unchallengeable by our law. And even determinations on the procedure by which the Arbiter's knowledge of the merits is to be obtained, are, in the general case, within his competency. But, in this last matter, there is this limit to his powers, viz., that he shall do strictly equal justice between the parties—that he shall not allow to the one, that which he denies to the other. For, the condition of the equal footing on which the parties stand, and of their equal rights to inform the arbiter's mind, *seems to me a necessary implication in the whole transaction*." His Lordship then added that if an Arbiter heard one party, he was bound to hear the other, and could not decide on proof brought by one party, to the exclusion of the proof brought, or offered to be brought, by the other. "Whether this can be brought, under the head of 'corruption,' or is to be viewed, perhaps more justly, as a breach of an implied condition in all submissions, it is unnecessary to inquire." Adverting then to the fact that the arbiter had decided on the proof taken by one party, without waiting for the proof to be taken by the other, his Lordship held that it involved "a clear violation of the principle already alluded to."

47. L. Jeffrey observed that "the true principle is, that an Arbiter's decree can stand only when he has done his duty fairly. I do not mean fairly, in reference to his moral dispositions; but he is bound to show this Supreme Court that he has dealt fairly, that is, equally, with both parties. Otherwise it must be held that he

[1] June 17, 1848, 10 D. 1308.

has violated the contract of submission, and acted *ultra vires compromissi.*"[1]

48. L. J. Clerk Inglis, in the case of Ledingham, observed that an arbiter's decision "may be challenged on the ground of such misconduct, leading to injustice, as the law holds to amount (without supposing any malicious or evil motive) to what the Act of Regulations intends by the term 'corruption.'"[2]

49. In the case of Miller,[3] where the arbiter was alleged to have unduly refused to allow a certain proof, L. J. C. Hope, after referring with marked approbation to the opinions of L. Fullerton and L. Jeffrey in Mitchell's case above quoted, observed as to the term "corruption:"—"I own I do not think that the competency of a reduction, on such grounds as the Court have in many instances adopted, depends on the construction of the term 'corruption.' I concur very much in the view taken by L. Fullerton, L. Mackenzie, L. Moncreiff, and L. Jeffrey, and other Judges, that, in reference to the contract of submission, there are certain essential duties incumbent and imperative on an arbiter, in the fair discharge of his duty, without which, as essentially necessary for justice, his judgment cannot be sustained; and also, that if he has been misled into a decision by matters for which one of the parties is responsible, the Court will interpose."

50. In the same case L. Wood observed: "I find it impossible to resist the conclusion that the term 'corruption' in the Act of Regulations has been held to admit of and require construction; and that, in construing it, a meaning has been put on it which renders it unnecessary to the success of a reduction of a decree-arbitral, that there should be a proof of moral corruption—of any moral wrong—or a wilful dishonest motive or purpose on the part of the arbiter. Accordingly, it is, I think, completely settled by the cases, that a palpable failure in the arbiter's duty, or such misconduct as to lead to manifest injustice, is sufficient to entitle the Court to interfere." "There may be this improper conduct—this violation of the essential principles by which an Arbiter ought to be guided (as contradistinguished from mere error in judgment), not only in refusing to hear parties, but also in certain circumstances, in refusing to allow proof, and also in other matters in the conduct of the submission."

51. Lords Cowan, Benholme, and Neaves observed: "The word

[1] June 17, 1848, 10 D. 1309. [See also Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271, where it was held that the fact of the arbiter's having received information from one of the parties outwith the presence of the other, did not in the circumstances, the arbiters being men of skill, amount to corruption in the sense of the Act of Regulations 1695. But it was observed by L. Deas that refusal or failure to hear one of the parties may quite well amount to corruption in the sense of the Act.]

[2] Dec. 16, 1859, 22 D. 250.

[3] Mar. 10, 1855, 17 D. 689.

'corruption' has indeed been considered open to a wider construction than its ordinary import would imply; and in some of the discussions to which cases of this kind have led, it has not always been kept in view that the 'corruption' to be alleged requires to be directed against the judges-arbitrators; in other words, that there must be ground in their procedure for impugning their judgment, on the ground of corruption attaching personally to the arbiters. It is plain that no error in judgment, however great, whether committed in the form, or substance, of the proceedings, which cannot be traced to a corrupt source, can form relevant ground for setting aside a decreet-arbitral, unless the Act of Regulations is to be disregarded. We have no doubt, however, that 'corruption' may be established, not only by direct proof, but by legal presumption, which may arise from proceedings of such an unfair kind as to infer, upon ordinary principles, that the arbiter's mind was not actuated by a due desire to do justice."

52. L. Curriehill.[1]—"It appears to be established, and not to be controverted, that according to the sound construction of what is called 'corruption' in the Regulations, it is not necessary to establish moral depravity on the part of the arbiter; and that it is sufficient to establish that, even from mistake or inadvertence, he has acted unfairly towards either party, by not placing him on an equal footing with the other. In particular, there is now no doubt that, if the arbiter should decide after hearing one of the parties and not the other, or should proceed upon the evidence adduced by either party, without seeing or hearing the counter evidence of the other party, such partiality, although it may have proceeded from inadvertence, or mistaken views of duty, would be held to be 'corruption' in the sense of the Regulations."

53. L. Deas observed that some of the decisions reducing awards did not fall under the head of "corruption," even taking the wide construction which the Court had repeatedly given to it;[2] nor did they fall in any other way under the Act of Regulations; that as a submission was truly a contract, the arbiter could not go beyond it, but must "decide the precise question submitted to him; and as regards the parties, there may be things done, or brought about, by either of them, contrary to the *bona fides* of the contract,—such as obtaining a favourable decision by fraudulent deception or imposition,—which shall afford a ground of reduction as being inconsistent with the very objects and meaning of the contract."

"There is nothing in this view inconsistent with giving full effect to the Article of Regulations which, Mr. Erskine says, was intended to prevent decrees-arbitral from being, as formerly, 'subject to reduction on the head of iniquity in the judge, or of enormous lesion to the

[1] Mar. 10, 1855, 17 D. 689.

[2] Mar. 10, 1855, 17 D. 718.

party.' The Regulation certainly was not intended to supersede or prevent full effect from being given to the expressed and implied conditions of the contract. Indeed it may be doubted whether the very words of the Article of Regulations, when rightly understood, do not leave all grounds of reduction, except those applicable to the opinions and conduct of the arbiter, to stand precisely as they did before."

54. L. Handyside.—"I have to express my concurrence in the explanations contained in the opinion of L. Deas, which I humbly think are of great importance as regards the question of the application of Article 25th of the Regulations, and as affording elements for discriminating the ground upon which some of the decisions should be held to rest."[1]

55. In another case of reduction of an award on account of the arbiter's refusal to allow a certain proof, it was observed by L. Moncreiff:—"By the strict terms[2] of the Act of Regulations, a decree-arbitral can only be impeached on corruption, bribery, or falsehood, which in its general effect has been recognised in all the decisions referred to; and particularly in the latest case in the House of Lords, Mackenzie *v.* Girvan, in a case of judicial reference. But looking at all the authorities, I do not find that this has been so strictly construed as that there may not be such a palpable failure in the duty of the arbiter, leading to manifest injustice, that the Court may interfere. The reverse has been clearly decided. The refusal to hear the party, or the hearing one party and not the other, and some other violations of the fair duty of an arbiter, have been held sufficient to set aside a decree." "And more particularly, I am by no means prepared to hold that there may not be a case in which the refusal to admit evidence, where evidence is clearly necessary, and essential to justice, may not, by itself, and without any other considerations, be a sufficient ground on which to challenge the decree effectually. I think that the cases have settled the law otherwise."

56. In another case it was observed by L. Jeffrey that "the term 'corruption,' in the sense of the statute, has been held to apply to cases where it is manifest that the duty undertaken by the arbiters has been blameably neglected and left unperformed; and I think this essential to justice." "The refusal of proof would amount to corruption," "if an arbiter who knows nothing of the case, decides it

[1] [See also Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271; and Cameron *v.* Menzies, Jan. 25, 1868, 6 Macph. 279. In the latter case, where a jury had set aside a decree-arbitral, both on the issue of corruption and of not hearing parties, it was held on a motion for a new trial that the jury was not justified in finding the arbiter guilty of *moral* corruption, as there had been no evidence of a moral bias or unfairness on his part. Observed by L. Neaves that it is inexpedient to examine an arbiter as to the motives which led him to pronounce his award.]

[2] Mowbray, June 2, 1848, 10 D. 1121.

off-hand, without inquiry, and in the face of an offer of proof."[1] In the same case, L. Mackenzie observed: "Generally, I think the mere circumstance that there has been a refusal to take evidence, is not absolutely sufficient as a ground of reduction, unless it infers a great failure in duty. Here I am not satisfied that there was any such failure. The alleged failure was to take the evidence of other skilful persons. Now, am I to hold that an arbiter does anything corrupt when he is himself acquainted with the subject, by taking his own opinion? I cannot hold that, and I therefore think there is here no ground for reducing the decree. I go upon this that there was no gross failure in duty."[2]

57. Without further multiplying quotations as to the construction and application of the term[3] "corruption" in the Act of Regulations, it would appear that, on considering the whole cases, there is, on the one hand, no small weight of authority for holding that, with scarcely an exception, it is only when a challenge of an award can be brought within the express terms of the Act 1695 that any award is reducible; while there is also, on the other hand, no small weight of authority for holding that, although there may be no procedure by an arbiter which can be impeached either for corruption (actual or constructive) or for bribery, or falsehood, and the Act 1695 is therefore inoperative in the case, yet the obligation to implement an award is essentially a *conditional obligation only*, and therefore must, at common law, be held of no force or effect, if the award be based on procedure which involves a violation of any of the material conditions on the faith of which it was granted.

58. In these circumstances it may be permitted to offer the following observations in support of the latter doctrine.

[1] Macdonald, Dec. 8, 1843, 6 D. 189.

[2] *Ibid.* 188. [In Mackenzie *v.* Viscount Hill and Tennant, June 2, 1868, 40 Jur. 499, where an award fixing the value of a number of sheep was challenged, the averment that parties had not been heard was held not to be a relevant ground of reduction, the arbiter being a man of skill, and having made a sufficient inspection of the sheep.]

[3] See the circumstances in which L. Thurlow, C., indicated an opinion that "the decreet appeared so partial, that it amounted to constructive corruption in the makers of it."—Colquhoun, 27th July 1784, 2 Paton 626. See also observations by the Court, as to the degree of excess, appearing on the face of an award, which might "of itself, prove corruption against the arbiter."—Edinr. and Glasg. Ry. Co., Jan. 28, 1840, 2 D. 486. [See also Alexander *v.* Br. of Allan Water Co., 5th Feb. 1869, 7 Macph. 492. In this case the value of a certain water supply in possession of the pursuer was submitted to an arbiter. He was of opinion that the pursuer's title to a portion of the supply was defeasible, and he therefore declined to put any value on that part of the water. In these circumstances the facts that he had incompetently entertained a question of law, and had refused to state in his award that he had excluded part of the water from consideration, were held to amount to legal corruption.]

(1.) It has the great advantage of reading the words of the Act 1695 according to their plain and natural signification. It can scarcely be doubted that it was in this sense, and no other, that these words were used by the legislators who framed that Act. If the word "corruption," taken in its ordinary acceptation, did not suffice, (along with "bribery" and "falsehood") to embrace all the grounds of challenge with which it was their intention to deal in framing the Act, there was nothing to hinder them, when moulding the language of the Act, from using such other appropriate terms as would suffice to carry out their views. It is indeed difficult to conceive that they should not have done so. In particular, it is difficult to imagine that in employing the well-known term "corruption," especially in juxtaposition with "bribery or falsehood," they could have intended to include any such errors of the arbiter as were not only free of all moral depravity, but might even have proceeded from mistaken views of duty.

(2.) But if it thus be almost morally certain that the very strained construction which has occasionally been put upon the word "corruption" is *not* in accordance with the sense in which that word was actually used in the Regulation when it was framed, it is most desirable to refrain from putting a forced and unnatural construction upon a plain, familiar word when used in a statute. And on this subject it has been observed by L. President Boyle, that "the terms of the Regulations, in warranting the reduction of a decreet-arbitral only on the grounds of corruption, bribery, or falsehood, *must be viewed as resting upon the plain acceptation of the terms used.*"[1]

(3.) This reading of the Act gives it a plain and definite object, and has the effect of adapting the remedial enactment precisely to the mischief which it was required to cure.

(4.) Unless the words are read in the definite sense which belongs to this construction, it is difficult to see what precise limit is to be assigned to their universality of application. It seems certain, however, that no other reading can be suggested which is not negatived by some authoritative decisions. And further, it would appear that any other reading has the effect of propping up an award, so as to place it beyond the reach of any challenge on the ordinary principles of contract law; thereby enforcing the private contract of submission against the parties, not only (like all other contracts) according to its true and genuine strength and import, but up to some indefinite point beyond that limit; for which anomalous treatment of the contract of submission it is difficult to perceive any good grounds, either of justice or policy.

(5.) Finally, it would appear that the reading of the Act in the sense now contended for, when coupled with the application of the

[1] Fraser, May 26, 1838, 16 S. 1055.

ordinary principles of contract law to the contract of submission, furnishes a satisfactory explanation of all the decisions which have been pronounced, either in the Court of Session or in the House of Lords, in the reduction of awards.

59. It should be observed, in conclusion, that the difference, in practical result, which would otherwise have arisen from the two respective modes of reading the Act of Regulations, has been very greatly diminished by the wide application which has been constructively given to the term "corruption," as before explained, in connection with that reading of the Act which most disclaims all aid from the principles of contract at common law.

60. On the whole, it would appear that the true object and the actual effect of the Act 1695 was, as suggested by L. Kames, to restore to the contract of submission its native force and vigour. It accomplished this by effectually excluding every challenge of an award on the mere ground of an error of judgment, if honestly committed by the arbiter. And at the same time there is weighty authority for maintaining that it left entire every ground of reduction which could be fairly rested on the alleged violation of any essential condition (express or implied), which qualified the contract of submission; whether as regulating the obligations of the parties towards each other, or the obligations of the arbiter towards them both. The practical result of passing the 25th Act of the Articles of Regulation has happily been, to bestow upon Scotland that final and conclusive determination of disputes by Arbitration which it was the object of parties to attain when they entered into the Contract of Submission, and, without attaining which, that important contract loses almost all its value.

CHAPTER III.

THE CONSTITUTION OF THE CONTRACT OF SUBMISSION.

SECTION 1.—*Written Submissions.*

61. IT is the general practice to constitute the Contract of Submission, in all cases of importance, by the execution of a formal deed in writing, duly subscribed by the parties, and completed with the solemnities of a probative writ. Considering the nature of the contract, and the variety of provisions which it should embrace, in stating the subject-matter submitted, the powers conferred on the arbiters and oversman respectively, the duration of the submission,

etc., it is highly expedient that a carefully prepared and formal deed should be resorted to.[1] But, as the essence of the contract consists simply in an agreement to submit a dispute to the judgment of one or more specified individuals, coupled with an obligation to abide by their decision, it is matter of frequent occurrence that submissions are entered into in a less formal manner.[2]

62. The written Contract of Submission, unless executed with all the formalities of a probative instrument, remains *per se* an invalid deed, so long as nothing has followed upon it. But in this contract, as in many others, either homologation or *rei interventus* will suffice to validate informal writings, and render the contract binding.[3] Even in a case where one of the parties had not signed at all, it was held that all were bound by the contract of submission, seeing that all had appeared before the arbiter, had assured him they were bound by mutual letters to abide by his award, and had each led evidence before him. In these circumstances, although the subject in dispute was an heritable right,[4] it was held that no *locus penitentiæ* remained to any of the parties.

[1] See Styles in the Appendix.

[2] [In Dykes *v.* Roy, Jan. 13, 1869, 7 Macph. 357, where a submission *in re mercatoriâ* was of an informal nature, it was held that the award, signed by the arbiter, did not require to be holograph or tested.]

[3] Grierson, etc., Nov. 23, 1699 (17022); Tailfer, Jan. 21, 1735 (17032 and 5657); Taylor, Nov. 25, 1800, F. C.; Tait on Evid. (ed. 1834), p. 110; Dickson on Evid., p. 306, sec. 550, and p. 309, sec. 559 [2d ed., pp. 376, 370]; 4 Erak. 3. 29, Note* p. 1016 (Ivory's Ed.), and authorities there referred to.—A. *v.* B. 1617 (12453 and 16829). [See also Elgin Lunacy Board *v.* Bremner and Elder, July 10, 1874, 1 R. 1155. A question as to liability for the maintenance of a pauper was referred by the inspectors of poor for two parishes, with the authority of their parochial boards, to a society of inspectors. The proceedings in the submission had been irregular in several respects; the minute of the meeting at which the case had been decided had not been signed; and the award, though printed in a magazine published by the society, had apparently not been transmitted directly to the parties. Notwithstanding these irregularities, the parish found liable obeyed the award for a year and a half, after which it repudiated liability. The Court held that, although the award was in itself worthless, and the reference in itself incompetent, as having been made to an uncertain person, the informalities had been cured (*alt.* L. Shand, *diss.* L. Benholme) by homologation and adoption. The judgment was affirmed by the House of Lords (June 24, 1875, 2 R., H.L., 136), but mainly on the ground that the reference was valid.]

[4] Two parties claimed a right of pasturage on a muir, which a third party (Gardner) had enclosed. Gardner wrote to each of them offering to submit the question to an arbiter named. One of them answered in writing, that he had seen the other (Colvill) and that they both agreed to the submission. All three met the arbiter on the ground, and stated in answer to his inquiry, that they had bound themselves by mutual letters to abide by his award. Colvill, however, had signed no writing whatever. They all led proof before the arbiter, who made an award against Gardner. In a suspension by Gardner, he maintained that Colvill was still free to resile, in respect that he had signed no letter agreeing to submit, and there-

63. It occurs not unfrequently that a submission, in place of being stated by itself as an independent deed, is introduced into another contract, of which it forms a subordinate part; as for instance, a contract of copartnery, when the partners insert a clause submitting, or agreeing to submit, their future disputes to arbitration; or a contract for making a portion of a railway line, or for building a bridge, etc. The Court have frequently noticed the benefit resulting from this ancillary submission, as it affords a speedy and equitable mode of adjusting those emerging disputes which might otherwise be highly injurious to all concerned.

64. Such an ancillary submission is generally made, as already noticed, in the form of a clause of submission, introduced into the body of the primary contract. But a missive, sent by a contractor to his proposed employers, obliging himself to execute the work under a certain contract, to the satisfaction of a man of skill, therein named, whose award should be final,—on the faith of which missive, the contractor received the employment and did the work—was held as binding as if it had been originally a part of the contract itself.[1]

65. The powers of the ancillary submission-clause remain latent until the actual emergence of disputes between the parties. But so soon as that event shall happen, the submission-clause admits of being easily called into operation in a much less formal manner than is requisite in originally constituting a formal submission. It would seem enough that both or either of the parties should address a letter to the arbiter named in the submission-clause, notifying to him that disputes had arisen, requesting him to accept the office of arbiter (if he had not previously done so), and to appoint claims to be lodged, or such other procedure to be adopted, as he considered best fitted for enabling him to decide the disputes in question. On his accepting

fore had made a mere verbal submission respecting heritage; and that if Colvill was free to resile, the other parties (including Gardner himself) could not be bound. The Court held that Colvill, had he attempted to repudiate the award, would nevertheless have been bound by it, "in respect of his appearing and adducing witnesses before the arbiter;" and they repelled Gardner's reasons of suspension.—Brown, Jan. 10, 1739 (5659). See also Kilkerran's condensed report of this case (8474). See similar case of Mackenzie *v.* Mackenzie, quoted by L. Auchinleck, in delivering his opinion in Wemyss, Nov. 15, 1768, Hailes' Dec. 239.

[1] Chapman, July 16, 1844, 6 D. 1288. L. Cuninghame, Ordinary, observed in his Note: "There is perhaps no stipulation more common in agreements for work falling within the department of architects, builders, and tradesmen generally of the same class, than that it shall be performed to the satisfaction of a referee of character and skill; and when such references are made to an individual named, they have uniformly been sustained in practice." In the Inner House L. Mackenzie observed: "No party ever entered into such an agreement as this—that he should execute work in such a way as should be found sufficient by a jury. But it would just come to that, if such an agreement as the present were invalid."

the office and appointing claims to be lodged, or otherwise making an order as arbiter, both parties would be bound forthwith to proceed before him as in any ordinary submission.[1] And the submission-clause being "part of a permanent contract," endures as long as the primary contract to which it is ancillary,[2] and there are disputes to be decided.

66. The ordinary powers of receiving claims, leading proof, and hearing parties, are all inherently implied in the office of an arbiter, which is bestowed by the submission-clause.[3] It would therefore be unnecessary to recite any grant of such powers in the missive requesting the arbiter to act. Nor would it be requisite to bestow a power of prorogation, as such a submission exists as long as the primary contract of which it forms a part. It does not even fall by the death of a party occurring during the subsistence of the primary contract, unless it has been otherwise expressly provided.[4] The power of awarding expenses inherently belongs to the office of arbiter, though not granted in express terms.[5] The consent to registration of the submission and award, if meant to be given, has of course been already given in the submission-clause. And thus the briefest and simplest missive suffices, as soon as disputes shall emerge, to call into oper-

[1] Even in the case in which the submission-clause did not contain words *de presenti* submitting but only words importing an agreement and obligation to submit to an arbiter named, it would appear that the whole powers of the arbiter could be effectually called into operation by the very simple procedure above mentioned, unless either party should insist, *in limine*, on the execution of a regular deed of submission, in consequence of the absence of words of actual submission, in the submission-clause.

[2] In Montgomerie, Dec. 8, 1849, 12 D. 274, it was held that a submission-clause had a co-endurance with the primary contract of which it formed a part. L. Mackenzie observed: "As the submission embraces all the disputes between the parties which may occur during the currency of the lease, it is not in the power of the arbiter to pronounce a final decree till the lease expires."—See also Watmore, May 17, 1839, 1 D. 743. That was a case of judicial reference; but it was laid down that "where even a private submission is entered into as part of a contract, such for example as an agreement of sale, the death of one of the parties does not evacuate the submission, because it is *part of a permanent contract*." [See also Birrell *v.* M'Culloch and Fyfe, Nov. 30, 1866, 5 Macph. 94. In that case a charter-party containing a clause of reference in case of dispute was entered into for a certain period. The charterer asked for and obtained a week's further use of the vessel. Disputes having arisen, and having been submitted to arbitration, it was held that the extension of the time did not form a new contract, but merely modified the old contract in one particular, and that it was not *ultra vires* of the arbiter to deal with matters connected with the extended time.]

[3] *Infra*, B. III. Chaps. I. and II.

[4] See references, sec. 65, *supra*. See also Opinions in Orrell, Feb. 22, 1859, 21 D. 554.

[5] Berry, Dec. 15, 1827, 6 S. 256; Smith, June 15, 1830, 8 S. 920; Fairley, Feb. 11, 1836, 14 S. 470; Robertson, Dec. 6, 1836, 15 S. 199; Ferrier, Jan. 28, 1843, 5 D. 456, Affd. April 18, 1845, 4 Bell's Appx. 161.

ation this most useful and convenient form of the contract of submission.[1]

67. The contract of submission has also been found to be effectually constituted by a series of missives, passing betwixt two correspondents, mutually therein agreeing to a reference of their disputes to an arbiter named.[2] And it is not uncommon in commercial disputes, even when large sums are at stake, or in other cases, where the matter involved is of no great magnitude, that parties exchange mutual missives in which the arbiter is named, the matter in dispute is stated, and the parties bind themselves to abide by the award. If these missives be holograph or tested, they are binding in themselves; if not so, they will become binding, if followed by homologation or *rei interventus.*

68. In like manner, a joint-missive, subscribed by both parties, and addressed to the arbiter, though improbative in itself, will make a valid contract of submission, when followed by the arbiter's acceptance, and by the parties pleading before him.[3]

69. If parties who have a dispute submit a joint-memorial, signed by themselves, to Counsel, setting forth, *inter alia*, that they have agreed to be bound by his opinion, the opinion so obtained will have the effect of an award, and will found a plea of *res judicata*, in the event of any attempt being afterwards made by either party to bring the same dispute before a Court of law. It will have this effect though the memorial and the Opinion be framed in the ordinary form, and of course not as probative writs.[4]

70. Though a person has not been originally a party to the contract of submission, yet if he signs and lodges a minute in the submission expressly agreeing to its terms, and binding himself to abide by the award when pronounced; and if he follows this up, by joining

[1] The great practical advantages which belong to this species of submission, in a large class of cases, have been repeatedly noticed on the Bench. See L. Pres. M'Neill, in Pearson, Feb. 4, 1859, 21 D. 424; L. Cuninghame, in Chapman, July 16, 1844, 6 D. 1288; L. Mackenzie, in Anderson, Feb. 27, 1850, 12 D. 787.

[2] Maclellan, May 14, 1828, 6 S. 790, and 4 W. & S. 157. This case is instructive as to the amount of waste expense which may be incurred when such an agreement is loosely entered into, and a supererogatory litigation accordingly ensues regarding the subject and limits of the submission.

[3] In a case in which it appears from the Session papers that the joint-missive of submission was improbative, the award was keenly challenged on other grounds; but no attempt was made to found an objection on the improbative nature of the writing which alone contained the agreement to submit. Fleming, July 7, 1827, 5 S. 841.

But in truth, cases of submission are of constant occurrence, in which informal missives, coupled with *rei interventus* or homologation, are found to be effectually binding as agreements to submit.

[4] Fraser, July 29, 1850, 7 Bell's App. 171. See Law of England on this subject, Boyd, 1834; 4 Nev. and Man. 99.

one of the original parties in lodging pleadings in the name of both, expressly designed as parties to the submission; and concurs in signing, along with all the other parties, a minute consenting to the registration of the award, for execution, when the same shall be pronounced; he will be found to have thereby constituted against himself an obligation to implement the arbiter's award as effectually as if he had been an original party-submitter.[1]

71. There are various other modes in which the contract of submission has, at times, been constituted;[2] some of which may here be shortly noticed, though it is not supposed that they are now in actual use. Apparently it was the practice, of old, that the parties subscribed not merely the submission, but also the foot of a blank page, forming a subsequent portion of the same sheet of paper, on which the contract of submission had been engrossed. Above the blank, the arbiter ultimately wrote the award, which was thus, *ex facie*, the signed writ of the parties themselves. An objection was accordingly taken, in one case, that the parties had only subscribed the submission, and consequently that the award had not been so extended as to bear the signatures of the parties appended to it, but only the signature of the arbiter. The answer was held good, that the signature of the *parties* was only required for the *submission;* the signature of the arbiter being, of itself alone, proper and sufficient for the award.[3]

72. It appears that, in early times, a bond of submission was not an unusual form of obligation, being accessory to some other principal obligation, and used for the purpose of adjusting the settlement of any disputes which might emerge in connection with the principal obligation. Such a bond of submission, though not acted on, subsisted for forty years, if the arbiter who was named in the bond survived so long.[4]

73. Erskine mentions that "submissions of debts or money-claims were sometimes executed by the debtor granting a bond to the creditor, and the creditor granting a release or discharge to the debtor, both blank in the sums, which are delivered to the arbiter, with power to him to fill up the blank as he shall find just."[5]

74. Elchies reports a sort of analogous procedure to this, in one case where a "submission was entered into, not in the ordinary form,

[1] Baillie, May 19, 1829, 7 S. 619. In the circumstances above mentioned, summary diligence was effectually raised on the award, against the supervenient party.

[2] See the statutory constitution of a reference, and the appointment of a statutory referee, in Stirling and Dunf. Ry. Co., July 11, 1856, 18 D. 1230.

[3] Beattie, Mar. 7, 1633 (16987). See Mackenzie's account of this form of Submission; Inst. 4. 3. 8. See Appx. xxxii.

[4] Boswell, Feb. 3, 1669 (9152); Sillartonhill, Mar. 1593 (635); Hepburn, Mar. 14, 1639 (638); Hay, Feb. 25, 1630 (637); 4 Ersk. 3. 29.

[5] 4. 3. 29.

but by both parties mutually accepting bills to each other, for a certain sum (£20), and the creditor in each bill indorsing it blank, and so consigning both in the arbiter's hands." The arbiters found £13 to be due by the one party to the other; and, to give effect to this finding, "they gave their decreet-arbitral by delivering to one of the parties, both bills, viz., his own acceptance discharged, and the other party's with a partial receipt (for £7) filled up in the blank, which restricted the bill to the sum they thought due." This bill, "being charged for," was sustained by the Court in a suspension."[1]

75. It will be remarked that this decision was pronounced before the Act 12 Geo. III. c. 72. L. Elchies observes, in his report, that it was objected "that that deborded greatly from the nature and design of bills, as instruments and vehicles of commerce, and was not a habile way of making submissions; which the Lords repelled—though I own I demurred."[2] It is perhaps unnecessary to quote further examples of the various forms under which the contract of submission may be entered into, not by the use of the regular contract of submission, but by the aid of less formal documents, coupled with the *actum et tractatum*[3] of the parties.

76. It may here be noticed, that, in the ordinary case, the submission is made, either to one sole arbiter, or to two arbiters, and, in the event of their disagreeing, to an oversman or umpire. The oversman is either named by the parties in the deed of submission, or is named by the arbiters under special powers conferred on them to that effect.

77. But sometimes a submission is made to two arbiters only, without giving them power to choose an oversman: a form which is liable to this grave objection, that, in the not improbable event of a

[1] Kerr, Feb. 19, 1751. Elch. (N.) Bill of Exch. No. 50 (1405). The submission by mutually placing bills in the arbiter's hands seems somewhat analogous to the submission "per mutuam dispositionem," mentioned by Ulpian. "Quid ergo (inquit Ulpianus), si res apud arbitrum depositæ sunt; eo pacto, ut ei daret qui vicerit; vel, ut eam rem daret si non pareatur sententiæ; an cogendus sit (arbiter) sententiam dicere? Et puto, cogendum," etc.—Pothier ad Pand. L. 4, t. 8, sec. ii. Art. 3 (15).

[2] The Suspender pleaded "That the bill was null, being granted *instead of a submission*, which ought to have been executed by a formal writ. Bills are allowed for the conveniency of commerce, but ought not to be sustained when they deviate from their proper nature."

Answered: "A Submission may be *verbal*; and it would have been a good way of making it effectual, *to have deposited money to be disposed of by the arbiters*. Bills are considered as money; so there was here no deviating from the proper nature of a Bill."—Sess. Pap.

[3] See an instance in which a written contract of submission was held to be materially enlarged beyond its original scope (so as, in fact, to superinduce a new submission upon the old one) by the pleadings and actings of the parties.—North British Railway Co., Nov. 27, 1855, 18 D. 102.

difference of opinion between the arbiters, the whole procedure is exposed to the hazard of becoming abortive for want of an award.[1]

78. Sometimes, also, a submission is made to three arbiters, with power to the majority to decide. This may involve the perplexing result of eliciting three several opinions, not only in respect to the terms of the ultimate award, but in respect to any step of procedure in the course of the submission. One arbiter, for example, may think at a particular stage, that, *ante omnia*, the parties themselves should be examined; another may consider that to be entirely objectionable, and desire an oral pleading before going further; while the third may stand alone in resolving that an inspection of the premises (or some other step) should precede anything else whatever. This form of submission has been described from the Bench (certainly in very strong terms), as "senseless and mischievous; founded on a totally wrong principle; expensive in its operation, and constantly ending in failure and disappointment."[2] It certainly appears to be a form of submission which ought to be avoided.

79. It would appear also that submissions have not unfrequently been made to two arbiters, and, in case of their differing, to either of them along with an oversman. But this seems also open to many of the objections just stated; as the oversman may differ from both of the arbiters.[3] This may tend to render the procedure abortive, or perhaps may lead to an unsatisfactory mode of working out a practical award, by striking a supposed average of the opinions of all three.

80. In a recent case,[4] the plan of the submission was to a single arbiter, in the first instance, with power to either party to appeal from his award to an oversman, named in the contract of submission. The oversman's appellate jurisdiction was subjected to various limitations. But in these and other respects, parties of course may vary their own contract, according to their own views of expediency. The styles given in the Appendix are those most commonly in use, and ordinarily the safest to follow.

[1] See the difficulties incidental to this form of submission illustrated in Merry and Cunningham, June 7, 1860, 22 D. 1148. [Affd. March 26, 1863, 1 Macph. H. L. 14. See also Cochrane *v.* Guthrie, March 30, 1861, 23 D. 865.] Apparently, in ancient times, it had been held that, in some cases, the Judge could compel the two dissentient arbiters to appoint a third, whose opinion, concurring with either of theirs, made a good award.—Reg. Maj., L. 2, c. 5, sec. 5.

[2] Per Coleridge, J., in Templeman, 1841, 9 Dowl. 966.

[3] See an instance of this class of submissions, in Macilhose, July 13, 1738, 5 Suppt. 204. See Love, June 1, 1825, 4 S. 54; an instance of the difficulties which may not unnaturally result from an appointment of five arbiters, with power to the majority to determine.

[4] E. of Hopetoun, Mar. 6, 1856, 18 D. 739.

SECTION 2.—*Verbal Submissions.*

81. With respect to verbal submissions, although it cannot be said that these are rejected by the law of Scotland, yet, as they can only be used within narrow limits—and even these limits are not well defined—such submissions may be regarded as possessing but little practical importance.

82. They may be divided into two classes: first, those which may be established by parol evidence; and second, those which can only be proved by the admission of party, on reference to oath or otherwise. Verbal submissions of the first class are apt to give rise eventually to troublesome and expensive questions respecting their true tenor, which is liable to be variously apprehended by the witnesses who are present at the time, or to be variously recollected by these witnesses afterwards. Besides which, there is the additional risk of having parol evidence tampered with, after the verbal award has been given; when the arbiter is *functus officio*, and a dispute as to the import of the award has eventually ensued.

83. No verbal submission can claim the benefit of the Act 1695; as that Act, in express terms, applies only to "a subscribed submission." But this does not deprive verbal submissions (in so far as they possess legal validity) of the important privileges which belong to a submission and award, as matter of contract between the parties, and independently of the Act 1695 altogether.

84. If the subject possessed sufficient practical interest to invite discussion, there would seem to be strong grounds for holding (notwithstanding some *obiter dicta*[1]), that every verbal award, in so far as the law holds it a competent procedure, should be exempt from all review by Courts of law upon the merits. The grounds on which this view is rested have been already stated, in considering the nature and object of the contract of submission, viewed as at common law. The same reasons which would exempt a written contract of submission, at common law, from all review by the Court, apply equally, in principle, to the verbal contract also. For, in any question of justice towards contracting parties, it is always the true import and effect of their mutual agreement—their *consensus in idem placitum*—not the mere accident, whether that agreement may be expressed by oral or by written symbols—that a Court of law regards; unless indeed, in the special case, where writing is made, by law, a necessary solemnity. It is then, of course, no more in the power of the parties to dispense with writing, than to abrogate any other law which is founded on public policy and must be enforced in all Courts. But it is perhaps

[1] See also 1 Bankt. 23. 21.

unnecessary, in the absence of any direct authority or decision, to enter further upon the subject.

85. It is only, however, within a very limited range, as already noticed, that verbal submissions and awards have been recognised by law as competent and valid procedure. There is a brief anonymous case in the Dictionary, to the effect "that verbal submissions and decrees-arbitral *inter rusticos*, for matters of small importance, are probable by witnesses."[1] Later decisions accord with this as a general rule, at least in limiting the competency of those verbal awards, which may be proved by parol, to matters of "small importance."[2]

86. Decisions fluctuated somewhat, in early times, on this subject. On the one hand, in the case of Barcklay, it was held that a submission and award "were only probable by writ, and not by the arbitrators' oaths; albeit the same was within £100 Scots."[3] On the other hand, in the case of Home, soon afterwards, a charge on a bond for 550 merks was brought under suspension, in respect of an alleged verbal submission and award, which had reduced the debt to 200 merks. It was there decided, that the reason of suspension "was relevant to be proven thus, by the charger's (?) oath that he did submit, and by the arbiters' oaths that they did accordingly determine."[4]

87. Apparently the word "charger" must be a misprint for "suspender;" in which case the submission was only allowed to be proved by the oath of party. But still the award itself was allowed to be proved by parol. For the oath of an arbiter, in proof of the tenor of his award, is not a proper oath of party, but merely the oath of a witness; who, no doubt, has the best *causa scientiæ*, but is still a mere witness, and not a party. But it would thus appear that this case, if correctly reported, went so far as to make it competent to cut down a bond by parol evidence. It has not since been followed, however;[5] and it may now be held settled, as a general rule, that parol proof of a submission or award is inadmissible in cases of importance.[6] Nor do any of the reasons in favour of parol proof

[1] A. *v.* B., Dec. 19, 1746 (8475). See also Gibson, Jan. 29, 1629 (16879).

[2] Tait on Evid., 302. (Ed. 1834.) It may be noticed here, that there is no objection to following up any competent verbal submission with a written award. It cannot affect any deed with invalidity, that is proved with more solemnity than the law requires.—1 Bankt. 23. 21.

[3] Barcklay, Nov. 14, 1666, 1 Suppt. 532.

[4] Home, Feb. 7, 1671 (8402).

[5] See observation of L. J. Clerk Boyle, in Ferrie, June 5, 1824, 3 S. 76.

[6] In this, as in many other respects, the law of England differs greatly from that of Scotland. It appears that in England "a parol submission is, generally, perfectly valid;" and further, that "it often happens in practice, that where the submission is in writing, it is altered or added to by parol." A verbal award may also

apply to the contract of submission, which have availed to admit parol in some other classes of important contracts, in respect of the necessities of commerce, etc.

88. Fraser raised an action against the representatives of Williamson for £93, 17s. 6d., being the balance of an alleged account for wages due to him by Williamson, now deceased. Fraser alleged there had been a verbal submission by the deceased and himself, and that an award was given in his favour for the above sum. He offered to prove the submission by the oaths of the arbiters, who were said to be *omni exceptione majores*. The Court found "that the alleged submission cannot be proved by parol evidence."[1]

89. Ferrie raised an action for payment of £414, the contents of a promissory note, which he alleged he had accepted for the defenders' accommodation. The matter in dispute involved an examination of mercantile transactions between three different firms.[2] Ferrie stated that the defenders and he had made a verbal submission of the question to an eminent merchant as arbiter, who had given a verbal award in his favour. He at first offered to prove the submission by the oath of the defenders, and the award by the oath of the arbiter. L. Pitmilly and L. Mackenzie (successive Lords Ordinary) found that he "had not offered to instruct his claim by competent evidence." Ferrie reclaimed to the Inner House, who refused the petition without answers. He again reclaimed and offered to prove the verbal submission by the oath of party, and the verbal award either by the oath of the arbiter or by the oath of party. He further offered, if necessary, to refer his claim itself, on the merits, to the oath of party. He prayed the Court "to allow him a proof of the submission and decree-arbitral in one or other of the ways above stated; and failing of that evidence being conclusive," he offered simply to refer his claim, on the merits, to the oath of party. The Court refused the petition, reserving to Ferrie to make any competent reference to the oath of party, before the Lord Ordinary. No further notice of the case appears in the Books.

be pronounced under a written submission; and "unless it is prescribed by the submission, the award need not necessarily be in writing;" but with this qualification, that probably a parol award would be ineffectual where it "concerned interests in land." But as "the parol submission and award form but one parol contract," they will be void under the Statute of Frauds, whenever such a contract, if verbally made, directly between the parties themselves, would have been void. Russ. 51 and 242, [4th ed., 46, 233]. It seems material to notice occasionally such discrepancies between the law of England and that of Scotland, on the subject of arbitration as indicating the great circumspection which requires to be exercised in quoting English decisions on arbitration law, unless by way of illustration merely.—In the Roman law, "Compromittitur, vel stipulatione interposita, vel nudo pacto." Hein. ad Pand., L. 4, t. 8, sec. 535.

[1] Fraser, June 24, 1773 (8476 and 12417). See also A. v. B., 1584 (12448).

[2] Session Papers.

90. The report of the case bears that "the Judges considered it unnecessary to decide whether there might not possibly be cases of so simple and trifling a nature as to admit of parol evidence of a submission; but they were unanimously of opinion, that, in the present case, it was an incompetent mode of proof; and it was observed that the case of Home[1] had occurred prior to the Regulations 1695."[2]

91. It may therefore be regarded as the settled general rule, that parol evidence of submissions and awards is inadmissible (at least without *rei interventus*), except in cases of small importance. There is one class of cases, however, which once formed, and probably still forms, an exception to this general rule, though none of the reported decisions are of recent date. Where parties have had a dispute respecting the marches of their adjoining lands, and have submitted the dispute to arbitration, parol proof has been repeatedly allowed, both of the submission and also of the award; the latter having been made in a practical and patent form, by the arbiters causing march-stones to be set, at their own sight, in their determinate places on the boundary line. Gilmour states the doctrine of his day, in these terms: "Differences about marches may be submitted and determined verbally; both submission and sentence may be proved *pro ut de jure*."[3]

92. Apparently this was allowed, partly in respect that "the setting down of march-stones, being a palpable fact, might be proven by witnesses, whether done by the parties themselves, or by friends chosen in their presence, there being neither decreet-arbitral nor submission in writ."[4] And the conduct of any two neighbouring proprietors, who, by themselves or their agents, attended on a third party while he set march-stones between their lands, and who witnessed this proceeding without objection, must always have afforded the strongest real evidence in support of the allegation that they had submitted the determination of their marches to that party; because it would seem nearly impossible to explain the *actum et tractatum* on

[1] *Supra*, sec. 86.

[2] Ferrie, June 5, 1824, 3 S. 75; and Session Papers. The case of Hutton, Feb. 23, 1830, 8 S. 591, was somewhat anomalous. An action, involving the right of property in a greyhound, was there dismissed, in respect of a written award disposing of that question, which had been pronounced between the same parties, after certain proof and pleadings before a party as referee; but without any written submission. It was a case of a very special complexion.

[3] Livingston, Feb. 1662 (12409 and 2200). [In Otto *v.* Weir, March 7, 1871, 9 Macph. 660, an opinion was expressed that a judgment by arbiters fixing the boundary between two village proprietors, followed by the erection of a mutual fence in terms thereof by the parties, was binding, although the submission was merely verbal.]

[4] L. Torphichen, Feb. 8, 1662 (2199). See also Pror. Fiscal Roxburgh, Nov. 28, 1672 (12410).

any other footing. This probably facilitated the admission of parol proof of submissions and awards in this class of cases. In all other cases of importance, it would appear to be now settled, as already stated, that parol proof of a submission and award would not be allowed.

93. This does not imply, however, that in such cases it would be incompetent to refer the tenor of a verbal submission and a verbal award to a party's oath. That would indeed be inept where the subject-matter of the award was heritage, and no *rei interventus* was founded on. Because, in dealing with heritable rights, the law, on grounds of public policy, requires the intervention of writing, not merely in evidence of the precise agreement or other deed of parties, but *de solennitate*, as a form which must be complied with, or else there is no valid obligation contracted, and *locus penitentiæ* remains. Therefore, although the tenor of both the verbal submission and the verbal award were clearly proved by reference to the oath of the party-submitter, the whole procedure would still be nugatory; it would only serve to raise the precise case in which the law, on grounds of public policy, refuses to allow validity to the transaction.[1]

94. But in those cases of importance in which the interposition of writing is not required *de solennitate*, but merely for the sake of evidence, it would appear that a verbal submission and award (which together make just a verbal contract of a peculiar form), when admitted by the party either on oath or otherwise, should be binding. For no written evidence of the tenor of a submission and award could be more conclusive against a party than his own admission must necessarily be. And where writing is not required *de solennitate*, any verbal contract (implying, of course, the deliberate consent of the party) should be just as binding on him as if it were reduced to writing. If, therefore, it were a matter of practical moment, it might form an interesting subject of inquiry, whether verbal submissions and awards, when proved by reference to oath of party, might not be held effectual in many transactions of importance. But as it is probable that few such cases actually occur, it seems better, in the absence of decisions, to refrain from entering further on the discussion.[2]

95. Where, however, verbal contracts relating to heritage have been followed by a sufficient *rei interventus*, all *locus penitentiæ* is

[1] 3 Ersk. 2. 2; A. *v.* B., 1584 (12448).

[2] See a rather special case, Williamson, June 18, 1777, 5 Suppt. 428, in which an award, which was too general in its findings, was allowed to be supplemented by a reference to the oath of party. A reference to oath was also sustained to support a submission (and a consequent award) at one stage of the discussion in Wishart, June 23, 1625 (17013). But the sum there involved was only £100 Scots, which is within the limit constructively assigned to the words, "of great importance," as used in the old Act 1579, c. 80.—4 Ersk. 2. 20.

barred, and the contracts become valid and binding. As this rule rests upon general principles, and has an extensive application,[1] it would seem that it ought to apply also to verbal submissions and awards, at least where these were proved by oath of party.[2]

96. Considering the great uncertainty which must attend on the right of any party who depends on the oath of his adversary for instructing it, and the very limited scope to which those submissions and awards are confined which can be proved by parol alone, as well as the lubricity of parol proof when applied to such a contract, it may probably be said with truth, that the chief practical instruction derivable from the Books, with respect to verbal submissions and awards, is little else than this, that they ought, in prudence, to be avoided altogether. Any procedure of that loose description is only too apt eventually to prove the occasion of disappointment and litigation, and sometimes heavy, abortive expenditure.

CHAPTER IV.

THE CONSTRUCTION OF THE CONTRACT OF SUBMISSION, MORE ESPECIALLY WITH REGARD (1) TO THE MOST COMMON STYLES OF THE CONTRACT, AND (2) TO THE SCOPE AND APPLICATION OF THE SUBMISSION-CLAUSE USED AS ANCILLARY TO ANOTHER AND PRIMARY CONTRACT.

97. In the Contract of Submission it is of essential moment that the subject-matter which is referred to the arbiter be well and precisely defined. If room be left for question and doubtful construction as to the extent and scope of the limits of the submission, this may give rise to a litigation which shall run the gauntlet of the Courts of law, up to the House of Lords. It is true that it falls to the arbiter himself to deal with such a question in the first instance, and to decide whether any given claim falls within the submission. Because it equally belongs to his office to give his judgment upon it, if it be within the submission, and to abstain from giving judgment on it, if it be *ultra fines*. But such a decision by the arbiter is necessarily, and in its own nature, open to the review of a Court of law. In so far as the Court shall hold that, in sound legal construction, a given subject is contained within the submission, the arbiter's judgment, on that subject, is free of review, just because it is within the submission. But in so far as the Court shall hold that a subject is not

[1] 3 Erak. 2. 2, and 3. ; M'Rorie, Dec. 18, 1810, F. C. ; Campbell, Mar. 5, 1813, Hume's Dec. 861 ; Maclean, July 1, 1834, 12 S. 865 ; Gordon, Nov. 12, 1674 (8415 Gosford's Report) ; Bargaddie Coal Co., Mar. 15, 1859, 3 Macq. 467.

[2] [See also Otto *v.* Weir, *supra*.]

within the submission, the arbiter's judgment regarding it is void of all authority. Were it otherwise, and if an arbiter's judgment as to the construction of the contract of submission itself were exempt from all review, he might exercise, without control, a usurped jurisdiction to any extent over subjects which the parties never intended to submit, and never had submitted to him.[1]

98. The prejudicial question, therefore, What falls within the submission? must necessarily be always open for the determination of a Court of law, where the parties eventually disagree as to the import of their own submission. It is thus highly desirable in all cases, and should not be unattainable in any, to set forth the subject-matter of the submission in terms sufficiently clear to avoid litigation on so vital a point.

99. It has been observed on this subject by Erskine, that liberality of construction should be the rule to follow. "Submissions being intended for a most favourable purpose, the amicable composing of differences, ought to receive the most ample interpretation of which the words are capable."[2] In applying this observation, however, it will at the same time be kept in view, that, while the object of "the amicable composing of differences" must be favourably regarded by the Court, and will always be promoted by them to the fullest legitimate extent, yet, as every submission involves in it the exclusion of parties from their natural and important right of resort to the Courts of law, there is ample ground for maintaining that a submission should not be loosely extended to include any subjects which do not clearly fall within it. There are several recent cases which appear strongly to exemplify the doctrine, that "an arbiter cannot be allowed to oust the jurisdiction of the Courts of law, nor can parties be considered as intending to do so, except to the extent which they have expressly specified."[3]

100. In construing the language of a contract of submission, for

[1] [See the instructive case of the Caledonian Railway Co. *v.* Greenock and Wemyss Railway Co., June 28, 1872, 10 Macph. 892; affd. Mar. 30, 1874, 1 R., H. L., 8. It is the duty of an arbiter to decide questions submitted to him, but not to define the limits of his jurisdiction where they form matter of dispute. The question whether a certain point is or is not within the submission is not a point in the submission. See also Shiels *v.* Shiels, Feb. 11, 1874, 1 R. 502, where L. Deas pointed out the distinction between a review of the case on the merits and on the question of jurisdiction.]

[2] 4 Erak. 3. 32.

[3] Per L. J. Clerk Inglis, in Calder, Feb. 10, 1860, 22 D. 741. See also Opinions of L. St. Leonards, C., and L. Brougham, in Blaikies, June 17, 1852, 24 Scot. Jurist 537; and M'Cord, Nov. 22, 1861, 24 D. 75. [See also Milne *v.* Mags. of Edinburgh, Feb. 15, 1770, 2 Pat. 209; Alexander *v.* Bridge of Allan Water Co., Feb. 5, 1869, 7 Macph. 492; Mungle *v.* Young, June 28, 1872, 10 Macph. 901 (decided Jan. 8, 1869); Caledonian Railway Co., *supra;* Lockerby *v.* Glasgow Improvement Trustees, July 16, 1872, 10 Macph. 971; Tough *v.* Dumbarton Waterworks Comrs., Dec. 20,

determining its actual scope and extent, where words of ambiguous or uncertain meaning have been employed, the Court in this as in many other contracts, resort, *inter alia*, to the conduct and actings of the parties under the submission, as affording a valuable key to discover the meaning which they themselves attached to their own contract. In some cases, even where the words of the contract were free from ambiguity, the Court have held the actings and pleadings of the parties to possess the yet higher power of enlarging the original contract, and causing it to include other subjects than were at first embraced by it, in respect that conclusive evidence was afforded, by the actings of the parties, of their mutual agreement to widen the basis of the original submission. *A fortiori*, such evidence may be supplied, by the same means, to the effect of removing an ambiguity in the reading of the contract.[1]

101. It cannot be said that there is any technical style requisite for the contract of submission; but there are three alternative styles, according to one or other of which the submission is commonly expressed,—the Special, the General, and the Mixed or General-Special Submission.

102. With respect to the Special Submission, which purports to set forth the precise subject-matter, or matters which are submitted to arbitration, an ordinary example of it will be found in the Appendix. In point of style or construction, it does not appear to call for any observation; its language being interpreted on the same principles as that of any other ordinary contract, and the only practical rule which requires to be followed being that of employing terms of clear and precise import, free of vagueness or ambiguity.

103. With respect to the General Submission, of which an ordinary example will also be found in the Appendix, it purports in the following, or some similar terms, to submit to the arbiter's judgment "all demands, claims, and disputes, questions, and differences, depending and subsisting between the parties, upon any account, occasion, or transaction whatsoever."

1872, 11 Macph. 326. In the last case, in which the submission was held not to exclude an action, it was observed that if questions falling within the reference arose in the course of the action, the aid of the arbiter would have to be invoked.]

[1] N. Brit. Ry. Co., Nov. 27, 1855, 18 D. 102. "There were three contracts. The first, dated in Feb. 1848, for making the Tranent Branch. The second, dated in August 1848, for making the Tranent Extension Branch. The third, dated in June 1849, for making Mr Cadell's portion of this last mentioned branch. The first contract alone, according to the pursuer's own statement, contained the clause of submission. The submission was extended so as to include the second contract, solely by the claims, states, and accounts lodged by the parties, and their actings and dealings under the submission. In precisely the same way it was extended to the third contract."—Per L. Deas, *ibid.* The other Judges expressed similar views.

See also the important effect given to the actings of parties in determining the legal effect due to a contract of submission.—Orrell, Feb. 22, 1859, 21 D. 554.

104. It will be observed that even general terms, as wide as those now quoted, do not include any disputes but those which are actually existing at the date when the submission is entered into.[1] Where an award, following on such a submission, has purported to dispose of all disputes between the parties—not merely those which already existed at the date of the submission, but also others which had subsequently arisen—an objection has accordingly been taken that the award was null, as extending *ultra fines compromissi*. In one case where this occurred, L. Elchies reports that the Court refused to annul the award; but, acting on a general rule, sustained it *quoad* all disputes which existed at the date of the submission, and which, accordingly, the terms of the submission covered.[2]

105. According to the true sense in which the general words, "all disputes," are used, the disputes must not only have had an existence prior to the date of the submission, but also must have remained unsopited as of that date, so as to have been truly within the view and intention of the parties when agreeing to the submission. The general words cannot fairly be allowed "to go back on old transactions which were not then in dispute, and not thought of when the submission was entered into."[3]

106. It may sometimes happen, that parties, *in limine*, find themselves at variance with each other on the question, whether some particular item of claim, on either side, was comprehended within the general submission. In such an event, it would seem to deserve an arbiter's consideration, whether he should proceed with the sub-

[1] [Nor can a plea of compensation, not especially referred, be competently entertained by an arbiter, even under a general submission.—M'Ewan *v.* Middleton, Dec. 14, 1866, 5 Macph. 159; Lockerby, *supra*.]

[2] Mackenzie, June 11, 1751. Elch. Arb. 9. L. Elchies observes,—"There have been many decreets-arbitral that ordered such discharges of all claims prior to decreet, which, though erroneous and *ultra vires* as to claims after the submission, yet were never found to annul the decreet as to the matters submitted."

It was likewise the doctrine of the Roman law, that a general submission only included disputes already existing at the date when it was entered into. "Compromisso generaliter concepto, de his solis judicare rebus et rationibus et controversiis, quæ ab initio fuerunt inter eos qui compromiserunt, non quæ postea supervenerunt."—Voet. ad Pand., L. 4, p. 8, sec. 18.

In the law of England, in the absence of express words to the contrary, it is held that only disputed matters, subsisting at the date of the submission, are embraced by it. Of this rule the following strong illustration is given:—"It is said, if the submission be respecting ewes with lamb, and the ewes, after the submission, but before the award, have lambs, that the arbitrator has no power to make any award touching the lambs."—Russ. 129, [4th ed., 121].

[3] Per L. Moncreiff, in Note to his interlocutor as L. Ordinary, in Hood, Dec. 13, 1832, 11 S. 209. A general submission "ought not to be so stretched as to include rights that cannot be presumed to have fallen under the view of the submitters; *ex. gr.*, an heritable right, of which one of the submitters had been in possession, without any challenge or interruption by the other party."—4 Ersk. 3. 32.

mission, unless the parties should first come to a distinct understanding with each other on this point: because if he should form an erroneous opinion on a subject so fundamental, it might eventually involve the overthrow of his award. He has a right to expect that the parties shall not, through any fault or misunderstanding of their own, subject him, and ultimately it may be themselves, to an embarrassment of this description.

107. But sometimes such a question does not emerge *in limine;* or there may be circumstances even then, which, in the arbiter's judgment, make it his duty to proceed with the submission, and to construe its scope and import as he best may. In such circumstances, it would appear that, where parties were at issue whether a given subject or item of claim, fell within a general submission, it would rest, *ante omnia,* on the party alleging that it did, to show that it was matter actually in controversy between them at the date of the submission. If it really had been thus in controversy, there must, in most cases, be some evidence extant of the dispute,—such as a pending or threatened action; a correspondence between the parties involving an assertion of the claim, met by a denial of it; or some overt acts affording proof to the same effect. As soon as it was shown, by some such evidence, that the subject was actually in controversy at the date of the submission, then the universality of the terms of the submission, as including all existing disputes, would throw the *onus* on the other party to prove that this particular matter had been excepted out of the submission. This, of course, might be done in various ways, as by adducing correspondence which directly, or by plain implication, excepted it; or by other means. Besides this, there is inherently a strong presumption that any subject of great patrimonial value (such as the right to an heritable estate, for example) would be expressly specified, if it were intended to be brought under submission, and would not be left to mere general terms. Hence it might well be, that where parties, having some minor disputes, agreed to a general submission, an arbiter would justly feel that he had no warrant to hold the greater subject to be submitted to him by the mere generality of the terms in the submission, although it might happen that no writing could be shown which expressly exempted it.[1] But the sound conclusion to be drawn by an arbiter, on such a subject, must vary with the varying circumstances of each respective case.

[1] It would rather appear that Paterson, March 4, 1612 (5064), was a case belonging to this category. It was there found, "that a general submission could not give the judges (arbiters) power to pronounce upon heritable rights." But the report is brief and slender. On comparing this case with that of Kincaid, Dec. 15, 1631 (5064), and the relative observations of Erskine, 4. 3. 32, the difficulty of laying down any fixed general rule of construction is apparent. See also Maxwell, Feb. 27, 1624, 1 Suppt. 15; *infra,* sec. 110.

108. When the parties are at one respecting the several subjects which fall under the general submission, it is nevertheless of great importance that a record should be made up at entering on the submission, and should be carefully preserved, distinctly stating what these disputed matters are, so that some permanent evidence may remain of the actual matters with which the arbiter was required to deal. From the vague and comprehensive terms of a general submission, which in themselves are wholly indefinite, there may otherwise arise hazard to the award, upon one or other of the alternative grounds, of its going beyond the submission, or of its not exhausting it. The arbiter, therefore, at entering on the submission, should adopt some procedure for the purpose of obviating this source of difficulty. It is one mode of attaining this object, if he appoints the parties to lodge claims, or a claim and answers, as the case may be; and thereafter, by mutual revisals and adjustments,[1] causes a distinct statement to be placed on record, containing the whole matters which he is to determine by his award. He then possesses a clear and well-defined limitation of the sphere of his arbitral functions.

109. Where this course is taken, if an objection shall afterwards be urged to the award that it did not exhaust the submission, a test will at once be afforded, by construing the general terms of the submission along with the written record, for determining whether the matter which is alleged to have been left undecided, was duly brought before the arbiter's notice, and thereby came properly within the submission. For, under a general submission, an arbiter can only be called on to decide such matters as have been duly brought before him for judgment. This last rule must be operative to limit the generality of the submission, otherwise it has literally no definite limits at all.[2]

110. The benefit to be derived from the use of claims by the parties, *hinc inde*, as furnishing proof of the particular subjects actually

[1] See details of such procedure more fully stated, *infra*, B. III. Chap. v.

[2] It appears also to be the law of England, that where parties in a submission meant to have all their disputes settled, it was nevertheless enough if the arbiter determined "all questions brought before his notice, though there are other matters within the scope of the submission to which his attention has not been drawn."—Russ. 257, [4th ed., 248].

So, where a general submission was made of all differences, and the award specially disposed of a single disputed matter only, viz., by ordaining the defendant to pay the plaintiffs "the balance due on the banking account of the defendant with the plaintiffs," the Court refused to presume, from the general terms of the submission, that there were other disputes between the parties besides this one, and held the award good, in respect the party impeaching the award did not show that there had been any other disputed matter for the arbiter to decide.—Russ. 270, [4th ed., 258].

In respect to the question whether there is an implied power under a general submission, to pronounce part-awards, and thereby obviate the plea of non-exhaustion, see *infra*, B. III. Chap. x.

embraced by a general submission, was exemplified as early as the case of Maxwell, where a question had been raised whether an award, disposing of certain heritable rights, was *ultra fines*. The Court "found that a submission, wherein parties submitted all controversies generally, could not be a warrant to decide the heritable right of the lands to pertain to one of the parties, and to take away the same from the other party; except either the right of the lands had been specially submitted, or else that the same had been given in by the parties, in their claims before the judges (arbiters); and that the general clause, submitting all controversies betwixt the parties, could not be a sufficient warrant to pronounce that decreet."[1]

111. In the absence of claims by the parties, lodged in the submission, the Court are obliged (when an award is challenged as *ultra fines*) to resort to other and less satisfactory sources of information, to assist them in construing the generality of the terms of the submission, with such limitation, that, whilst it still includes all the subjects which the submission was actually designed to embrace, it may be allowed to include nothing more. In these circumstances, it has frequently happened that questions of a difficult and perplexing kind have arisen; but the relative decisions are chiefly, and perhaps necessarily, of a circumstantial character, so that it is not easy to deduce general doctrine from them. They are available, however, as indicating what are the several sources of information, extrinsic of the deed of submission and of the award, to which the Court have had recourse, to aid them in determining whether a given decerniture in an award, under a general submission, has been within, or without, the actual limits of the submission, as it was practically laid before the arbiter. A note of some of these cases is accordingly subjoined.[2]

[1] Maxwell, Feb. 27, 1624, 1 Suppt. 15.

[2] Steele, at his death, left two sons, Alexander and George, with a settlement conveying his whole property to his second son George, under the burden of an alimentary provision in favour of Alexander, who was described as of weak intellect. Alexander raised an action of count and reckoning against George, concluding for payment of his *legitim*. In that process he acknowledged or implied the validity of his father's settlement, except as regarded the *legitim*. The action was taken out of Court, in consequence of the parties agreeing to a submission of "all demands, claims, and disputes, questions and differences, depending and subsisting between them upon any account, occasion, or transaction whatsoever."

No written pleadings were laid before the arbiters, who were a farmer and a village innkeeper. An award was pronounced, which decerned George to pay £648, 5s. to Alexander, "in full of all claims of every interest whatsoever that the said Alexander Steele shall have a right to, from the said George Steele, in behalf of their father and mother's subjects, heritable and movable, previous to the date hereof."

There was a document extant, which had been prepared by the arbiters themselves, and which, *in gremio*, set forth that it had been "made up by the arbiters at pronouncing decree." It purported to state the funds of the deceased father, and to allot one-half of the whole, or £648, 5s., to Alexander, which involved the setting

112. From these and similar cases, it would appear that, when the Court are necessarily constrained to look beyond the four corners of the contract, as in the case of a general submission, for authentic

aside of the father's settlement in favour of George, not only in so far as it affected *legitim*, but in all respects.

George Steele brought a reduction of the award, alleging, *inter alia*, that notwithstanding the general terms of the submission, it had truly included no other dispute but that one as to the *legitim* due to Alexander, and therefore that the award was *ultra vires*.

For assistance in determining this question, L. Glenlee, Ordinary, had recourse to the following sources of information, extrinsic of the contract of the submission: —(1) The previous action between the parties, for the purpose of ascertaining that its conclusions only embraced a claim of *legitim*, and that the settlement of the deceased father was not otherwise challenged; (2) the fact that no other claim respecting the succession of the deceased had been made as at the date of entering into the submission; (3) the fact that the action had been taken out of Court, *unico contextu* with entering into the submission; (4) the tenor of the settlement of the deceased father; (5) the document, or notes, which had been prepared by the arbiters at pronouncing decree, and which exhibited the total funds of the father as thereby divided into two equal sums of £648, 5s. each.

L. Glenlee found, "That although the decreet-arbitral does not specify the principles on which the arbiters proceeded, yet it sufficiently appears that they proceeded upon the footing that the funds of the father of the parties were to be equally divided between them, which appears to the Ordinary to have been highly unjust, as there was no pretence whatever for setting aside the father's will; and of course the defender could only be entitled to his *legitim*." His Lordship further found that the decree-arbitral was affected by an *error calculi*, and had left a point undetermined; but, apparently, these two findings were not adopted by the Interlocutor of the Inner House. His Lordship then added, "And the Ordinary is of opinion that, under all these circumstances, there are sufficient grounds for setting aside the said decreet-arbitral," which was reduced accordingly.

When refusing a representation against this interlocutor, his Lordship further found, "That although the defender now objects to his father's testament, on the footing of its not being written on stamped paper, and being defective in the solemnities, yet he never did so before; and that in the process at his instance, which depended before the present Lord Ordinary, and was taken out of Court by the submission, he acknowledged the validity of the will, and only concluded in his libel, that he was at liberty to repudiate it, and to claim his *legitim*; so that the dispute as to the amount of the *legitim* was, in fact, the only dispute between the parties, in so far as concerned their father's succession, at the time they entered into the submission. And the Ordinary is of opinion, that, in fact, the objections now made by the defender to the said will do not appear to have been stated and pleaded on before the arbiters; and that they had not even the will itself before them, but only a copy, from which, as far as the Ordinary observes, no defect in the necessary solemnities appears."

A Reclaiming Petition was presented to the Court, contending, *inter alia*, that, from the comprehensive terms of the submission, the decreet-arbitral was not *ultra vires*; and that it was incompetent to go beyond the decreet-arbitral itself, in order to discover on what ground it proceeded.

On considering answers, the Court, while divided in opinion as to the effect of the *error calculi*, held the objection of excess of power to be established, and "in respect the decreet-arbitral appears to be *ultra vires* of the arbiters, adhered to the interlocutor reclaimed against." The rubric of this case in the Faculty Reports is,

information to show what were the subjects actually falling within the submission, they have allowed parties for this purpose to found, not only upon the pleadings and procedure under the submission, and

"The meaning of a General Submission explained by a previous process in the Court of Session, and the decreet-arbitral, which went beyond the points which had been debated in Court, reduced as *ultra vires*."—Steele, June 22, 1809, F. C.

In another case, after a correspondence between the parties on the subject of a claim of remuneration for the use of some springs of water, consequent on certain operations made by one of them, a submission was entered into, of "all clags claims, questions, demands, and differences, of whatever nature, presently subsisting between them, either arising out of the acts" of the one party or the other. In the pleadings, reference was made to the previous correspondence, as containing the claim of the party seeking remuneration. That party also stated his claim, in writing, to the arbiter. An award was given, which, "in the first place," found that, "although the foresaid submission is quite general in its terms," yet "the only matter brought before the arbiter" was the foresaid claim of remuneration for the water. The award then proceeded to find a certain annual sum due to the claimant for a period of years, but under various conditions. The other party brought a reduction of the award, alleging (*inter alia*) not only that it included matter not submitted, but also that it did not exhaust what was submitted. In pleading the question of the true scope of the submission, both parties, *hinc inde*, referred not merely to the terms of the pleadings in the submission, but also to their correspondence which had preceded it. And the L. O. Moncreiff, in his Note at reporting the case to the Court, expressly took both of these elements into consideration in dealing with the question.

The Court, in the special circumstances, sustained the award. Their Lordships did not express any doubt as to the competency of taking into view the several sources of information above specified, in determining the actual limits of the submission. L. Balgray, in particular, observed, "The submission was of so general a nature, that it is necessary to have recourse to the letters of the parties for information. Upon looking to them, I conceive that, in substance, the matters ultimately decided by the arbiter were specifically brought before him from the first." —Finlay and Co., June 25, 1834, 12 S. 792.

See also, in connection with this subject, Pitcairn, May 20, 1825, 1 W. & S. 194. A tenant, being in embarrassed circumstances, and having a decree of irritancy of his lease taken out against him, entered into an arrangement with his landlord, under which he renounced his lease (without prejudice to the foresaid decree) on certain conditions. The parties, at the same time, entered into a written agreement to submit all their mutual claims, which was expressed in very large and comprehensive terms. This was followed by some further legal procedure, resulting in a general submission. Subsequently, an attempt was made to reduce the award of the arbiter, by showing that a certain remarkable claim by the tenant, which the arbiter had sustained, was not within the submission; the same not having been stated at all, prior to the submission, and being in its own nature (as alleged) excluded from the scope of the submission. In discussing the question of what had been comprehended within the submission, the parties respectively relied, not merely on the claims lodged in the submission, but also on the preceding agreement to submit—the circumstances in which it was entered into—the terms of the lease—the conditions of its renunciation—and the various legal proceedings which had taken place between the parties,—all as elucidating what were the claims and disputes actually pending, *hinc inde*, between the parties, at the date of entering into the submission, and therefore within the view of the parties, as the subjects to be submitted. The Court of Session held, in the circumstances, that the particular

especially the claims *hinc inde*, but also upon their agreements or correspondence which had preceded it—upon previous processes between them—upon leases or other contracts creating reciprocal obligations between them—and generally upon any facts, or any surrounding circumstances, which brought out the actual position of the parties, and their true relations with each other, at least as regarded the disputes or differences which were already broached between them, as at the date of their entering into the contract of submission.

113. There is another element of evidence, in questions regarding the construction and scope of a submission, which parties have frequently pressed upon the Court,—viz., the Arbiter's Notes. With respect to the use of such notes, there is a distinction which requires attention. Where the question at issue, in the reduction of an award, is, whether certain subjects were truly comprehended within the general submission; and, in evidence of this, the pleadings of the parties before the arbiter are referred to, then the arbiter's notes, in so far as they contain a record of what was pleaded before him, seem to be a legitimate element of proof. And this, it would appear, would equally be so, whether the notes were referred to *in gremio* of the award, or not. Because, in either case, they may form an important ingredient of evidence to show what had been pleaded, and put in issue, in the course of the submission.[1]

114. But sometimes the arbiter's notes are referred to for a very different purpose. In one case,[2] for instance, the pursuer of a reduction of an award contended that the grounds on which it rested were to be found in certain notes of opinion issued by the arbiter, in the course of the submission, after hearing parties; that it thus appeared

claim in question fell within the submission, and their judgment was affirmed. The case is very instructive as to the importance of the parties understanding each other thoroughly, *in initio*, as to what subjects are to be included under a general submission.

See also Halley, July 9, 1833, 11 S. 942, in which the Court, by the aid of evidence extrinsic of the contract of submission, found that the submission was to be held as intrinsically qualified by a certain condition, which was not expressed in the contract, but on the faith of which the contract had been entered into. When so construed, the contract was found to impose a material limit on the arbiter's powers.

See also Renton, June 9, 1847, 9 D. 1209; and Ferguson, June 20, 1828, 6 S. 1006; *infra*, sec. 114.

[1] Respecting the use of arbiter's notes, as throwing light upon an analogous question, it was observed by L. J. C. Hope, in Wauchope, June 16, 1846, 8 D. 820, "When the objection stated to an award is, that a party has not been heard, it may often be of importance to look at the notes issued by a referee, with the view of discovering whether the objection be well founded or not. But these notes cannot be used for impeaching the grounds of the award. The referee's views may change in the course of the discussion," etc. See also Bell, Dec. 8, 1825, 4 S. 289.

[2] Ferguson, June 20, 1828, 6 S. 1006. See same doctrine applied in Crawford, July 7, 1812, excerpted from Note Book of L. J. C. Boyle; Parker's Synop., xx. 64.

that the award was rested on a medium of liability which was excluded by the terms of the submission; and that the award was therefore *ultra vires*. But the award itself neither expressed any special medium of liability, nor made any reference to the notes; and therefore the answer was held good, that as such notes were merely evidence of an opinion which had been entertained by the arbiter at the date of issuing them, but which might be changed by him on further reflection[1]—and as no reference was made in the award to these notes,—they afforded no proof that the award was actually rested on the medium of liability alleged by the pursuer. On the contrary, as there were good grounds of liability on which it could be rested, every legal presumption was in favour of the award having rested on valid grounds alone; and the notes, in such circumstances, were of no avail. The Court held that the notes could not be used as contended for by the pursuer, and sustained the award.

115. It would thus appear, that where a reduction turns upon the question, whether certain subjects were comprehended within the submission, and were accordingly pleaded upon by the parties, without objection, before the arbiter, as falling under the submission, the notes of the arbiter recording the purport of the pleadings of the parties (whether referred to in the award or not) may be relevantly founded on, as an element of evidence which will be more or less cogent, according to circumstances. But where a reduction turns on the alleged *medium concludendi* on which the award was founded, the notes issued by the arbiter pending the submission (where such notes are not referred to *in gremio* of the award) cannot be held to instruct the state of the arbiter's opinions as at the date of giving forth his award; because they only prove the state of his opinions during an inchoate stage of the procedure. But where the notes are referred to *in gremio* of the award itself, as containing the grounds on which it is rested, they necessarily become part of the award, and may be so argued upon in any question respecting its import or validity.[2]

116. On the whole, in concluding these observations on the construction of the general submission, so as to determine what are its actual scope and limits in any particular case, the doctrine of chief practical application, deducible from the decisions just quoted, would appear to be, that a contract in the style of a pure general submission may be fruitful of waste expense and uncertainty, unless both parties shall, *in limine*, adopt some such procedure as that of lodging claims which set forth, *hinc inde*, their whole demands against each other.

[1] Lang, Nov. 23, 1852, 15 D. 38. See opinion of L. J. C. Hope, p. 52; L. Fullerton, p. 44; L. Cowan, p. 57, etc. Robertson, June 20, 1783 (653); and Hailes' Dec. 912.

[2] "The Notes are very properly referred to here, because they are referred to by the award itself."—Per L. Cottenham, in Mackenzie, Mar. 9, 1843, 2 Bell's App. 52.

This indeed seems to be so essential for defining the precise scope of a general submission, that it might be worthy of consideration whether such a submission should not always contain, *in gremio*, an express provision that both parties should lodge their respective claims within a given time after the arbiter had accepted his office.

117. The Mixed, or General-Special Submission, is that in which there is a general clause, submitting all disputes between the parties, coupled with a particular specification of some subject or subjects of dispute, which are precisely set forth. An example of this very common style will be found in the case of Ferguson, *supra*, sec. 114; and an ordinary style is given in the Appendix.

118. With regard to that portion of the mixed submission which is special, it seems unnecessary to add anything to what has been already said, *supra*, sec. 102. When questions arise respecting the true scope and extent of that portion which is general, there is the same important element of construction, in this case, which exists in regard to any other contract or deed, in which a general clause is coupled with a particular. In such circumstances, it is the presumption of reason, as applied to practical affairs, and therefore it is also the presumption of law, that the general clause embraces only matters which are *ejusdem generis* with the particulars which are enumerated in the special clause.[1] The express enumeration of certain particulars affords a distinct indication of the class of subjects which were actually present to the mind of the parties, at the time of their agreeing to submit. There is a strong presumption, therefore, that the general clause was truly intended only to include any matters of a similar class, which might have been omitted in the special enumeration. "The general is not extended to matters of greater importance than the greatest of these particulars, unless both be of one kind, as a greater sum with lesser sums expressed."[2]

[1] When an objection is taken to an award, under such a submission, that it has not exhausted the matters submitted, the importance of this rule of construction becomes apparent. On a question which closely approaches to this, the following observations have been made by L. Kilkerran, in L. Lovat, June 22, 1738 (625):—

"The effect of arbiters not determining the whole matters submitted is settled by a distinction, whether it be a submission only of particulars, or only general, or of particulars with a general."

"In the first and second case, the leaving anything open voids the whole; in the third case, the particulars being determined, the decree stands good, though there be nothing done upon the general; provided that no claim upon the general, having connection with any of the particulars determined, be left undetermined."

"Accordingly, in this case, where the submission was, of particulars with a general subjoined of all other claims, the Lords sustained the decree-arbitral, whereby all the said particulars were determined, although there were other claims, falling under the general, left undetermined by the arbiters."

[2] 1 St. 18. 2. The same rule is also given by Stair with respect to the clause of warrandice in a disposition: 2. 3. 46.—"The general clause is not to be extended to subjects or claims of a different kind, or of a greater importance, than any of the par-

119. In a submission which embraced certain liferent rights of land which were specifically stated, there was added a general clause, which (though not quoted in the report) was described by the party founding on the award, as including "all actions, questions, quarrels, and controversies betwixt the parties." An award was pronounced, affecting the fee of the lands in question; to which it was objected, "that the general clause can never be extended to matters of greater importance, nor the particulars expressed in the submission, viz., the said Peter's liferent, etc., and this right of the lands of Turings is a far greater matter nor those other particulars submitted. The Lords found the decreet null, in so far as it concerned the said lands, which were not expressly submitted; and that the said general clause could not comprehend greater matters than were particularly submitted."[1]

120. It may be observed, before leaving this subject, that there is the greatest advantage in an arbiter's requiring claims to be lodged by both parties, on the threshold of the mixed submission, although the step may not be so indispensable as it is in the general submission. In particular, it prevents all after questions, whether new matters, not particularised in the submission itself, were truly brought before the arbiter for judgment. And whenever such new matters (in respect, for example, of not being *ejusdem generis* with the matters particularised) are open to objection, at the moment of their being first stated, as not falling within the submission, the existence of claims and answers, containing the discussion of these new matters, without objection to their competency, would foreclose all such objection afterwards. Whereas, if such new matters are brought forward by the one party, and are disposed of by the award, while no distinct written evidence is extant to show that the other party had acquiesced in their being discussed before the arbiter, a dangerous question may

ticulars mentioned in the special."—3 Erak. 4. 9. See also 4. 3. 33; and 1 Bankt. 23. 7. See also observation by L. Brougham, in construing a statute which enumerated certain particulars, viz., "any goods, wares, merchandise," and added the words, "or other thing to be sold," etc. His Lordship said, "Generally speaking, there can be no doubt that the rule is inflexible, that if, after an enumeration of particular things, words of that kind are added, they must be taken by reference to the preceding enumeration, to be things *ejusdem generis*," etc.—Henry, 9th Aug. 1834, 7 W. & S. 432. See also Stark, Mar. 20, 1630 (6834).—In Stewart, Feb. 23, 1709 (6836), a submission was made of all differences, and particularly of a certain claim of tocher; the award decided the claim of tocher, and further decerned the parties to refer a certain other claim (of aliment) to a referee named. One of the parties objected to go into this reference, and contended that the award had not exhausted the submission, by not deciding the claim of aliment. The other party judicially passed from the claim of aliment, and successfully maintained that, *quoad ultra*, the award was good, having exhausted the submission, by disposing of the only particular claim (of tocher) contained in the submission.

[1] Incheffray, Mar. 4, 1607 (5063).

remain behind, which it may be difficult to deal with, upon inferential evidence of acquiescence, deduced from loose and unsatisfactory materials.

121. Where a pending action is taken out of Court by the parties agreeing "to refer the whole matters in dispute" to an arbiter, who is authorised "to decide the whole cause," the conclusions of the action afford the measure of the pursuer's claims submitted to the arbiter, and an award which goes beyond them will be open to challenge as *ultra vires*.[1]

122. In questions arising under Ancillary submissions, interesting discussions have recently taken place regarding the construction of the submission-clause, so as to determine the true sphere of its application. It is true that these cases necessarily relate, in some degree, to the particular terms of individual deeds, and otherwise savour of specialty; but they nevertheless have given occasion to the delivery of instructive doctrine from the Bench regarding this branch of the law of arbitration.

123. Ancillary submission-clauses are commonly expressed in terms of brevity and much generality. But as they are truly a part of the primary contract to which they belong, this has the effect of inherently qualifying their terms, and regulating the extent and scope of the questions which are intended to be embraced by them. Where such a submission-clause occurs, for instance, in a contract of partnership, imbedded among a series of provisions all of which deal with the ordinary rights and interests of a partnership, and purport to regulate the ordinary contingencies or vicissitudes to which a partnership is liable, it would appear that the clause, though making a general reference of any differences which shall arise between the partners, is to be read as applying only to those differences which are connected with the adjustment of that class of rights, interests, and contingencies, which is shown to have been in the contemplation of the parties, by having been specially treated of in their deed of partnership. This affords, in truth, just another illustration, that the indefinite generality of the expressions in the submission-clause requires to be restrictively construed, with special regard to the particulars to which it is adjected; otherwise, a meaning would be given to the submission-clause which the parties had never contemplated, and a new contract would thus be made for them which they had not made for themselves.

124. Accordingly, where such a submission-clause occurred in a contract of partnership, and one of the partners raised an action of damages against the other, charging him with having acted in illegal, fraudful, and malicious violation and breach of his contract-duty, and

[1] Carruthers, Nov. 25, 1830, 9 S. 66. [See also opinion of L. Deas in Shiels v. Shiels, Feb. 11, 1874, 1 R. 502.]

having collusively reared up a case of fictitious bankruptcy for the purpose of destroying the company, and having thereby caused great injury and damage to the company, and to the pursuer, it was unsuccessfully maintained by the defender that the action was excluded in virtue of the submission-clause. The Court held that such a claim of damages did not fall within the fair scope of the submission-clause; and that the pursuer had never intended to deprive himself of recourse to a Court of law, in so unforeseen and extraordinary a case. It was observed, that "an injury of that kind was not within the reference, any more than if the defender had committed a criminal assault on the pursuer on the highway."[1]

[1] Per L. Cuninghame, in Lauder, Mar. 9, 1852, 14 D. 633.

The contract of copartnery, in its several articles, regulated the duration of the partnership; the mode of carrying on the business; the amount of capital to be put in by each partner; the general duties of each respectively; and other similar matters. After disposing of the greater part of these topics, Art. 11 provided that, in case of the death or bankruptcy of a partner, a valuation of the stock, etc., of the company should be made under the direction of "the arbiters after named." Art. 12 provided that, on the expiry of the contract, etc., a valuation (or eventual division) of the stock, etc., should be made (in case the partners themselves disagreed) by arbiters and an oversman after named. Art. 13 provided that, if the principal partner died during the contract, the other partner was to have a preferable right to acquire a certain lease of premises, at such yearly rent as should be fixed by the said arbiters or oversman. Art. 14 regulated the terms on which each partner should act, in drawing out his stock. Art. 15 was in these words: "If any differences shall arise between the partners themselves, or, in the event of death or bankruptcy, between the surviving and solvent partner and the representatives or creditors of the other, all such are hereby submitted" to arbiters and an oversman named: "whose decision shall be final, and binding on all concerned."

The only remaining article was that by which the parties bound themselves, under a penalty of £100, to implement the contract; and consented to registration, etc.

When the first half-year's rent of the company premises became due, Wingate, the principal partner, who was owner of the premises, granted a bill to himself, at ten days, signed by the company firm, for the amount of the rent. He discounted this bill with a private party, who, when it fell due, raised diligence on it; after which, the same partner, with concurrence of this party, presented a petition for sequestration of the company, which was granted. Lauder, the other partner, afterwards obtained a recall of the sequestration, as being unwarrantable.

Lauder then raised an action against Wingate, alleging that the company was perfectly solvent, so that the rent could have been regularly paid as soon as it fell due; that Wingate (while keeping him—Lauder—in the dark) had fraudulently and maliciously concocted and carried out the above scheme, for destroying the partnership by a false allegation of bankruptcy, in order to get free of the subsisting contract; and that he had thus caused great injury to the partnership and to the pursuer. The action concluded for £5000 damages; and also for decree against the defender, to implement the contract of copartnery till its expiry.

Wingate pleaded, in defence, that, from the generality of the terms of the submission-clause, such a claim fell to be submitted to arbitration, and the Courts of law were excluded. The pursuer answered, that such a claim as the present was entirely out of the fair scope of the submission-clause, which was merely auxiliary to the contract of partnership; and that this was the more evident, from consider-

125. In framing articles of roup, it is not uncommon to insert a stipulation that any differences respecting the intent and meaning of the articles shall be submitted to an arbiter named. Unless great care be taken in preparing the submission-clause, questions are apt to be raised respecting the true scope to which it extends. In particular, wherever it is intended that such a general clause shall include some matter of an unusual kind, it should never be relied on that mere generality of expression, annexed to ordinary articles of roup, will suffice to cover it. Nor ought this, in fairness to intending purchasers, to be attempted.[1]

ing the several subjects which, in Arts. 11, 12, and 13, were specified as matters for submission.

The Lord Ordinary, Cowan, repelled the defender's plea, and observed, in a Note: "The Lord Ordinary cannot accede to one view pressed by the pursuer—viz., that the general clause of submission in the contract is to be confined in its operation to the matters referred to in the 11th and 12th Articles. The words, 'any difference,' are quite general, and must be so construed as to embrace all differences arising between the partners, their representatives or creditors, in regard to all or any of the matters with which the deed of partnership, under its several heads, professes to deal. Had the Lord Ordinary considered that the claim for reparation and for implement, for which the summons concludes, had its foundation as laid in what might fairly and properly be held a mere difference between the partners, as to their rights or obligations under the contract, he would have given effect to the preliminary defence. But the nature of the statements made in support of the action, and the terms and nature of the conclusions, appear to him such as to take the case out of the operation of the submission-clause. What is alleged by the pursuer, is a series of wrongous acts on the part of the defender, to get quit of the copartnership; and, in particular, it is specially set forth, that, in illegal, fraudulent, and malicious violation and breach of his contract duty the defender attempted to create a fictitious bankruptcy of the concern, and thus to destroy the partnership by wrongously applying for and obtaining sequestration of the company's estates, whereby grievous loss and injury have been inflicted on, and suffered by, the pursuer."

His Lordship proceeded to state, that he held such a cause of action not to be comprehended within the scope of the submission-clause: and that, "if the case stated for the pursuer be well-founded on its merits, the claim he makes for reparation appears to be one which the Courts of law alone, and not the arbiters named in the contract, can entertain."

On a reclaiming note, the Court unanimously adhered.

[See also cases cited in note, p. 78.]

[1] Though every such question is almost necessarily, in some degree, special, a case may be quoted, of recent occurrence, as illustrating this subject. The articles of roup were so framed as to possess a very enlarged scope, and yet great difficulty was found to exist (eliciting much difference of judicial opinion) in determining whether they sufficed to cover the subject of dispute which arose. The reversionary right to a sum of £4000, subject to a certain liferent, was exposed for sale. The 6th and 7th articles of roup specified the nature of the right which was to be granted to the purchaser; the 7th article enumerated the deeds which instructed it, and which were to be delivered over to the purchaser;—"with the sufficiency of which writings, and of the security of the sum hereby exposed, the purchasers are to satisfy themselves before the roup, and, by their becoming offerers, are entirely debarred from making any objections against payment of the price, on any account whatever,

assumed by an
s had specially
e. But, never-
and the scope of
stain the arbiter's
A purchaser bound
successive quantities,
d. It was held com-
sputes respecting "the
ne that the obligation

. If any questions shall arise
articles, the same are hereby
After the roup, the purchaser
l ever indefeasibly vested in the
s that did not fall within the scope
of law. The exposers maintained
hey laid the matter before the arbiter,
findings against the purchaser. The
on and interdict, to prevent the ex-
ence. The L. Ordinary, Robertson (2),
the articles of roup, as to the sufficiency
reference to the arbiter, the chargers are
ice against the purchaser, until it shall be
. that the right and interest in the foresaid
therefore sists process for ten days, in order
process of declarator," etc. On a reclaiming
rey held that "the arbiter is entitled to decide
e bound by the 7th clause of the articles of roup
xposed, on the conditions therein expressed being
, and observed, "No doubt it appears difficult, at
prehensive terms in which all matters touching the
articles of roup are referred to the learned arbiter.
s far to solve that difficulty. I admit that there was a
e of all disputes which might arise as to the intent and
ut I hold that disputes as to the right of the respondents
e not validly submitted to the arbiter, because they could
mined by him. There were other parties besides the sub-
sted in the solution of the question of vesting, and who
y any decision pronounced by the arbiter." L. Mackenzie
rt, by a majority, altered the interlocutor of the L. Ordinary,
ons of suspension.—Watt, Mar. 6, 1849, 11 D. 970.

l, Feb. 9, 1858, 20 D. 514, in which an agreement, in the articles
any disputes arising, "in any way relating to the premises," was
bar an action, by the purchaser at the roup, against the seller,
ntially for implement of the contract of sale, and for damages
alleged non-implement.

noticed here, in connection with this subject, that where one of the
rsing meeting declared that "the stewards and secretary will decide
s that may arise, and their decision shall be final," it was held that this
ed only to differences arising on the course, and did not import an agree-
bmit to their decision, a dispute regarding the patrimonial interest in this
Graham, Feb. 5, 1848, 10 D. 646.

to deliver had been abrogated by supervening circumstances, highly prejudicial to the purchaser, which were created by the fault of the seller, and which would have greatly enhanced the price of the subject sold, beyond what had been agreed on, if the obligation to deliver had still continued in force.[1]

127. The submission-clause has of late years been frequently rendered auxiliary to important working contracts, such as a mineral lease, for example, or an agreement for making a line of railway. It would be difficult to overestimate the practical benefit which has accrued to undertakings such as these, by calling to their aid the cheap and swift equity of arbitration procedure. In a mineral lease, for

[1] Miller, Feb. 6, 1851, 13 D. 608. A party sold an heritable subject for £1425. It was agreed that the purchaser should pay the value in coals, delivering a given quantity at specified prices; the whole to be delivered before a certain date, and under certain rules as to the weekly rate of delivery. A submission-clause in the agreement provided that, "in case any difference or dispute shall arise between the parties, as to the quality or delivery of the said coals, such dispute is hereby submitted and referred to Archibald Kenneth, coalmaster," etc. The delivery of the coals was interrupted at an early period, by arrestments which were used by creditors of the seller. Before these arrestments were loosed, the period for delivery of the coals had nearly expired, and coals had materially risen in price. The purchaser, therefore, refused further delivery, and called on the referee to decide on this question, as it involved a dispute regarding the delivery of the coals. The seller objected that the dispute was not within the submission; but the arbiter repelled the objection, and found that the obligation to deliver coals was no longer binding on the purchaser, who would thereby be subjected to loss caused by the seller's fault. The seller brought a reduction of the award as *ultra vires;* but the Court sustained it. L. Fullerton observed: "It is obvious to me, that the question here raised does concern the delivery, and nothing else; it is just whether, after the delay to take delivery—a delay which was entirely imputable to the pursuer—he was entitled to demand delivery of coals at the prices in the agreement? It is in vain to say that the arbiter is thus putting an end to the contract. The contract was a contract of sale of land: the clause regarding coals is a subordinate condition, involving a commutation of the price into coals, at specified rates, deliverable within a certain period; and all differences as to delivery were submitted to the arbiter. He has determined that the pursuer was no longer entitled to demand delivery, and I think that was clearly within his powers."

See also Ewing, Jan. 13, 1825, F. C., in which a clause in the articles of roup of certain lands provided that, "in case any difference shall arise between the exposer and the purchasers concerning the import of these articles, or the execution and implement thereof, the same shall be, and is hereby referred" to an arbiter named. There were two bidders at the sale. The party preferred, being charged for payment of the price, presented a bill of suspension, alleging that the other bidder was merely a puffer, or "white bonnet;" that the price truly due by the suspender, in "implement" of the articles of roup, was therefore the amount of his first bid, and no more; and that the determination of the question thus raised, as to "implementing" the articles of roup, fell under the submission-clause in the articles of roup, to the exclusion of the jurisdiction of the Court. The L. Ordinary, Meadowbank (2), refused the bill of suspension; but the Court, by a majority, altered this interlocutor, and "found that the question at issue betwixt the parties falls under the clause of reference."

example, which imposes mutual and detailed stipulations on both lessor and lessee in regard to progressive workings for a series of years, it is evident that momentous disputes may emerge from time to time, during the currency of the lease, regarding the true import of the reciprocal obligations of the parties towards each other. These disputes peremptorily demand a speedy and equitable adjustment. Unless, therefore, some apt machinery for such adjustment were provided towards the extrication of the contract of lease, it is probable that when such disputes arose, prolonged interruption to the workings on the one hand, or faulty deviation from regular working on the other, might occur, to the heavy loss of one or both parties.[1]

128. From the opinions which have been delivered in some recent cases, respecting the ancillary submission-clause, it would appear that "it is the natural construction of all such clauses, that, without very express words, they are not to be carried beyond the term for which the primary contract endures."[2]

129. That the proper function of the submission-clause is that of "an executorial clause—a clause for carrying out the conditions and provisions of the lease (the primary contract), and for preventing violations of them by the parties during its currency: but that it is not to endure after the termination of the lease, when there is no longer anything to be done or to be avoided by the tenant, and no longer anything to be done or to be avoided by the landlord."[3]

130. That where there are provisions in the primary contract, which are proper to take effect, *sua natura*, at its close, such as those which regulate a lessee's removal, and his restitution of the ground in a certain prescribed state at his removal (or the like), the disputes which may emerge respecting these provisions, although arising after the lease has come to an end, are nevertheless to be viewed as disputes regarding matters "executorial of the contract" of lease: and so falling naturally under the ancillary clause of submission.[4]

[1] In the case of a submission-clause, ancillary to a contract for making a portion of a line of railway, L. Mackenzie observed: "In regard to the clause itself, I see the greatest expediency in embodying it in such a contract. A contract of this sort is very peculiar, and without such a stringent clause a railway contractor might cause the greatest possible damage and inconvenience to the railway company and to the public. He might indefinitely postpone the completion of the line, by going to law with the company as to every matter on which they could not agree; and, in order to prevent such disastrous consequences, this clause is introduced for the purpose of settling all differences in a summary way. Such a clause is very necessary, too, for the protection of the contractor's interests," etc.—Anderson, Feb. 27, 1850, 12 D. 787. See also L. P. M'Neill, in Pearson, Feb. 4, 1859, 21 D. 419.

[2] Per L. Ivory, Pearson, Feb. 4, 1859, 21 D. 419. [See, however, Birrell *v.* M'Culloch and Fyfe, note 2, p. 47.]

[3] Per L. President M'Neill, in Pearson, etc., *supra*.

[4] Per L. Ivory, *ibid.*

131. That where disputed claims are only brought before the arbiter for the first time, after the lease has expired, and when their object is not to seek the fulfilment of any obligation in the lease, but, on the contrary, to ask for damages in respect of the past contravention of some such obligation, committed while the lease was yet current, such disputed claims do not naturally or legitimately fall under the submission-clause, even although it may have been expressed in apparently broad and comprehensive terms.[1]

132. That, having regard to the presumed object and intention of the parties, in selecting a man of skill, such as a practical engineer, for their arbiter, and empowering him generally to dispose of any dispute or difference respecting the "meaning or execution" of the primary contract, it probably will not be held that "the arbiter is to have power to deal with all legal questions bringing out abstract right, and interpreting and construing the legal rights of the parties:" and it would therefore be doubtful "whether he would be entitled to deal with questions of homologation, or questions of tacit relocation, or many questions which might arise out of the contract, and lead to distant and consequential results."[2]

[1] Pearson, *supra*.

[2] Per L. Ivory, *ibid.* See also, as to this, opinion of L. Fullerton, in Blaikies, *infra*, sec. 138.

As the case of Pearson is highly instructive regarding the import and effect of the ancillary submission-clause, it is here subjoined.

A lease of coal for nineteen years, from 1837, excluding assignees and subtenants, bound the lessee to work in a regular, tradesmanlike manner, and imposed various conditions upon him, to regulate his operations during the continuance of the lease. The lease provided for periodical inspections of the work, and reports thereon to be made to lessor and lessee, at joint expense. It also bound the lessee to fill up pits, if required; to remove rubbish, etc., and to leave the grounds at the close of the lease, in "an arable and tenantable condition," etc.

The lease contained the following submission-clause:—"Further, in case any disputes or differences shall arise between the parties as to the meaning or execution of these presents, the same shall be, and hereby are referred and submitted to the decision and decreet-arbitral of John Geddes, mining engineer in Edinburgh; with all the powers necessary for bringing such disputes to a just and speedy issue."

Numerous inspections and reports as to the state of the workings, were made during the lease. In 1851, an agreement was entered into by the lessee with Allan, the manager of another colliery, under which the latter worked the coal till the end of the lease; for which period the lessor alleged that no inspections or reports had been made. In 1851, the lessor exercised the option of taking a lordship on the output of the coal, in place of a fixed rent, and continued to do so during the currency of the lease.

After the expiry of the lease, the lessor preferred a claim of damages to the arbiter, in respect of alleged nimious and excessive workings, especially during the last three years of the lease; and also in respect of a wrongful and injurious mode of working the coal. In support of the claim, the lessor contended, *inter alia*, that the working agreement with Allan was, in truth, a covert assignation, in defraud of the provision excluding assignees.

The lessees objected that the claim of damages did not fall within the clause

133. With respect, however, to all the above limitations of the scope and operation of the submission-clause, it is clear that parties, if they think fit, may render that clause broad enough, or explicit enough, to embrace the whole disputes above enumerated, without exception. But where the parties intend that the clause shall include all emerging disputes, though not in matters executorial of the lease, it would be advisable to specify expressly that the clause is meant to include such questions. And so, also, if it be intended that disputes involving questions of homologation or tacit relocation, or the like (as referred to by L. Ivory, *supra*, sec. 132), shall be submitted to the arbiter, under the foresaid ancillary clause, it would be apparently desirable

of submission. They maintained that this clause was essentially ancillary to the primary contract, the lease, and was intended to afford a convenient aid to the parties in enforcing due execution of their mutual obligations, *hinc inde*, during the carrying on of the workings and the progress of the lease. But where it no longer could have an executorial effect, inasmuch as the lease was at an end; and where the only claim was one of damages for alleged contravention; there was no place for calling into operation the submission-clause. This was the more evident where a nice question of law was involved, viz., whether the working agreement with Allan was, in truth, a covert assignation: a question which it never was intended to submit to the engineer, who was the arbiter, to decide.

The arbiter repelled the plea of the lessee, and proceeded to allow a proof; whereupon the lessee brought a declarator and interdict, to have it found that the claim of the lessor did not fall within the reference, and that the arbiter should be prohibited from further procedure.

The L. Ordinary, Benholme, assoilzied the lessor, and the lessee reclaimed. L. Pres. M'Neill, after adverting to the utility of such submission-clauses in many contracts of lease, etc., and the propriety of keeping their operation within their proper province, observed: "The claim of the lessor, it is very clear, is not a claim to compel fulfilment of any condition in the lease. It is not a claim to require the tenant to do anything, or to desist from doing anything, which was stipulated for, in the lease, to be done or to be avoided, either before or after the termination of the lease. It is a claim for damages, in respect of something that is said to have been done during the currency of the lease; and the arbiter is now called upon, not to see to the proper execution of the lease, but to determine that claim of damage, in respect of something that is said to have been wrongously done before the lease was concluded. It appears to me that the clause was not intended to cover, and does not cover, that species of claim. I think that, in its true meaning, this clause is a sort of executorial clause,—a clause for carrying out the conditions and provisions of the lease, and for preventing violations of them by the parties during its currency; but that it is not to endure after the termination of the lease, when there is no longer anything to be done or to be avoided by the tenant, and no longer anything to be done or to be avoided by the landlord. There is no stipulation in this lease which can be put in motion and executed now. This is therefore a matter which is independent of executing the lease—it is a matter which arises out of what is said to have been an improper dealing with the subject of the lease pending its currency; but it is not a matter now to be prevented." L. Ivory observed: "My view of this case is, that, as between the tenant and the landlord here, this clause of reference—embodied in a primary contract of lease—is a subordinate contract entirely, ancillary to the primary contract with which it is connected; and, except in so far as it is ancillary to the execution of that contract,

to use express language, for the purpose of certainly including such questions within the submission-clause.

134. The particular dispute which was held, in the case of Pearson, not to fall within the powers of the arbiter under the ancillary submission, was a question of damages, claimed only after the lease, the primary contract, had expired; at which time the claim could not be regarded as, in any sense, auxiliary to the working of the lease. The whole Court allowed weight to this consideration, in holding that it did not belong to the proper province of the ancillary clause to deal with such a claim. L. Ivory, in particular, said, "I should doubt, upon the principles which were so far given effect to in the case of Blaikie,[1] whether this clause is of a kind that, in any shape, would

I do not think it has any legal existence whatever. As your Lordship expressed it, it seems to me to be a reference, strictly executorial of the principal contract." His Lordship afterwards added, "I have no doubt it is the natural construction of all such clauses, that, without very express words, they are not to be carried beyond the term for which the primary contract endures."—"I do not, however, mean by this, that it is confined to the term of nineteen years, because there are matters, executorial of the contract, which were to be performed after the nineteen years were out, as to removal, and the duties of the tenant after the removal, with regard to the proper and due restitution of the subject. I think all of these are executory of the primary contract, and all of these are within the province of the referee, under a clause of reference of this kind. But there is nothing of that kind brought before us," etc.—"I have only to add a single word as to that which I meant to have noticed at the beginning, as affecting the power of the arbiter,—what is meant by the 'meaning or execution' in the clause of reference. As I have observed, there is no question raised on these words, as regards any claim founded on the meaning of the contract. But the meaning of the contract, as these words are used in the clause of reference before us, is not that the arbiter is to have power to deal with all legal questions bringing out abstract right, and interpreting and construing the legal rights of the parties. That is a great deal too broad. I doubt whether he would be entitled to deal with questions of homologation, or questions of tacit relocation, or many questions which might arise out of the contract, and lead to distant and consequential results. The words are, 'meaning and execution.' I think there is a correlation between these two words in the intention of the parties. They mean, in so far as the provisions in the contract—as the wording of these presents—affect the execution of the contract. It is, that, in regard to all matters executorial, the arbiter shall have it in his power to read the provisions of the contract, in order to give effect to the execution of the contract," etc. L. Curriehill and Deas concurred, and judgment in favour of the pursuers was pronounced accordingly. [See also Milne *v.* Mags. of Edinburgh, Feb. 15, 1770, 2 Pat. 209; M'Cord *v.* Adams, Nov. 22, 1861, 24 D. 75; Mungle *v.* Young, June 28, 1872, 10 Macph. 901; Caledonian Rail. Co. *v.* Greenock and Wemyss Rail. Co., June 28, 1872, 10 Macph. 892, and March 30, 1874, 1 R., H. L., 8; Tough *v.* Dumbarton Waterworks Comrs., Dec. 20, 1872, 11 Macph. 236. In these cases also the clause of submission, being of an ancillary and executorial character, was held to exclude the jurisdiction of the Court in those questions only which referred strictly to the execution of the contract. In Davie *v.* Friendly Society of Colinton, Nov. 10, 1870, 9 Macph. 96, a dispute as to the legality of an alteration of the rules of the society was held not to fall within a rule of the society providing for the settlement of disputes by arbitration.]

[1] *Infra*, sec. 138.

have entitled the arbiter to deal with the question of damage. But still, if the matter had arisen during the lease, and if the enforcement of damage could have been indirectly used to the advantage of the tenant, or the landlord, in regard to matters of execution within the lease, I should have had less hesitation in regard to it."

135. Accordingly, in the case of Montgomerie,[1] an award was sustained which was pronounced during the currency of a mineral lease, by an arbiter, under an ancillary submission-clause, decerning, *inter alia*, for damages against a landlord. The tenant applied to the arbiter, setting forth an alleged breach of contract by the landlord in refusing to sink a new pit; and craving authority to sink a pit at the landlord's expense, and also a decerniture of damages against the landlord for the loss already suffered from his breach of contract, up to the date of the application. The arbiter gave an interim award, authorising the tenant to sink the pit, and also decerning for damages against the lordlord. A reduction of the award was brought, in which the Court assoilzied the defender. It is true that the Court were of opinion that the landlord was barred by homologation from challenging the award; but the Court also expressed an opinion that the award was, in itself, well founded, and would have been sustained though no homologation had taken place.[2]

[1] June 23, 1848, 10 D. 1387.

[2] This case is interesting, in regard to the import and function of the ancillary submission-clause; the more so as it contains an award of damages,—a subject respecting which the arbiter's jurisdiction has sometimes been regarded as of a peculiarly delicate character. It also discusses the question, how far a submission-clause in a lease is valid against a singular successor in the lands.

In a coal lease for twelve years, various stipulations were introduced with respect to the contingency of the lessee requiring to sink new pits—his obligation to work in a regular manner—the erection of colliers' houses, etc. It was provided that, "in case of any dispute or difference arising between the said parties respecting the true intent and meaning of these presents, or in any manner of way relating to the premises, either during the currency of this lease or after the expiry thereof, all such disputes and differences shall be submitted and referred, from time to time, as the same shall arise; and the parties hereby submit and refer the same" to an arbiter named, "whose decision shall be final, and binding on both parties."

During the currency of the lease, the lessor sold the lands; and thereafter the lessee applied to the purchaser for leave to sink a new pit, which was refused. The lessee then presented a claim to the arbiter, for authority to sink the pit; and also for damages occasioned by the temporary want of a pit, through the purchaser's refusal.

The purchaser appeared, and pleaded before the arbiter under circumstances which were eventually held to infer homologation by him of the arbiter's power to deal with the whole questions raised by the lessee's claim. The arbiter pronounced an interim award, finding the lessee entitled to sink a new pit; and afterwards an interim award of £120, as damages for the temporary want of the pit.

The purchaser brought a reduction of the award, contending that the submission-clause did not affect him, a singular successor in the lands; and further, that it was

136. It should be kept in view, in framing a submission-clause in a contract of lease, that if its terms be so broad as to "imply that the parties were bound to submit all questions which might arise on the construction of the lease," some of the Judges, in the case of Montgomerie, expressed great doubt whether such a clause would be effectual against singular successors in the lands. Because "the construction of the lease is a matter proper for Courts of law; and such a clause

ultra vires of the arbiter, either to give the authority, which he had done, to sink the new pit, or to award damages for the temporary want of the pit.

In defence, the lessee pleaded homologation by the purchaser; and *separatim*, that the submission-clause, being essential for the extrication of the lease, and a condition of the contract, passed, as part and portion of the lease, against singular successors; that the award was within the arbiter's powers, both because of the generality of the clause, in submitting "any dispute or difference respecting the true intent and meaning of these presents, or in any manner of way relating to the premises;" and also because the subject of a dispute as to the sinking of a new pit, was specially one of the eventualities contemplated under the lease, as involving a recourse to the arbiter. It was within the arbiter's competency to award the damages.

The L. Ordinary, Ivory, assoilzied the lessee, and observed in a note, that he "holds the pursuers, though singular successors, clearly bound by the clause of reference contained in the tack. They have adopted the contract thereby created; and the obligation to refer, not having reference to any matter merely extrinsic, or which can be regarded as, in any proper sense, foreign to the proper object of the lease, but, on the contrary, constituting an express condition of the contract, and necessary to its extrication, according to the *modus operandi* intended and bargained for from the first, it must receive effect as a stipulation essentially inseparable from the whole substance of the right." His Lordship held, both that the arbiter had jurisdiction and had pronounced a valid award; and also that the pursuer had "acquiesced in, and homologated, the proceedings of the referee."

L. Ivory further observed, *inter alia*, with respect to the power of the arbiter, under the submission-clause, to deal with the lessor's refusal to allow the new pit to be sunk: "The real question is, Has the proprietor done justice by his tenant, having regard to the whole scope of the lease? and has there arisen a dispute between the parties in regard to that question? If so, the powers of the referee, as conferred by his tack, appear to be sufficiently ample; for it is there stipulated that, 'in case of any dispute or difference arising between the said parties, respecting the true intent and meaning of these presents, or in any manner of way relating to the premises, either during the currency of this lease or after the expiry thereof, all such disputes and differences shall be submitted to,' and disposed of by, the referee."

On a reclaiming note, L. Pres. Boyle concurred with the L. Ordinary, holding that homologation had barred the purchasers from their present action; and, moreover, that the submission-clause was not extrinsic to the lease, but "of the essence of the contract;" and therefore transmitted against singular successors; and further, "that the words of the clause reach every dispute that can possibly arise between the parties."

L. Mackenzie concurred; observing, *inter alia*, that the submission-clause was "a most proper and reasonable condition of the contract" of lease, and was therefore good against singular successors.

L. Fullerton concurred in holding that the plea of homologation supported the L. Ordinary's interlocutor of absolvitor. But on the subject of the transmissibility of the submission-clause against singular successors, and as to its true scope, his Lordship expressed himself as follows: "The clause of reference is very broad, and

as that is not a necessary part of a lease as between landlord and tenant. In all the cases in which it was held that a stipulation such as this was transmissible against singular successors, either from usage or from the nature of the thing, arbitration was necessary for the purpose of extricating the lease."[1] But, apparently, a submission-clause which forms a "proper and reasonable condition" of the contract of lease, and is fairly requisite for its extrication, "must receive

really seems to imply that the parties were bound to submit all questions which might arise on the construction of the lease. I would not be inclined to say that such a clause was transmissible against singular successors. The construction of the lease is a matter proper for courts of law, and such a clause as that is not a necessary part of a lease, as between landlord and tenant. In all the cases in which it was held that a stipulation such as this was transmissible against singular successors, either from usage or from the nature of the thing, arbitration was necessary for the purpose of extricating the lease. But I think it unnecessary to decide any general principle of law, as the matter in dispute, in this case, is one of those questions which are specially referred to the arbiter by the lease. If I were satisfied that the clause relied on by the pursuers gave the landlord absolute power to claim the rent, and still refuse to open new pits, I would have great difficulty in saying that, in these circumstances, this question could be adjudicated on by an arbiter, against the consent of a singular successor. But I do not take that view of the clause; it conferred upon the landlord an *arbitrium bonum et æquum*; but it is impossible to hold that it entitled him absolutely to refuse that any new pit should be opened. I therefore think that this was just one of the questions which fell within the description of disputes which the arbiter could competently decide, since its settlement was necessary for the extrication of the lease. The landlord was bound to assign a reasonable cause for his refusal, and the question whether he had such cause fell under the category of disputes contemplated by the lease. The right of refusal cannot be capriciously exercised. The whole judgment of the arbiter proceeded on the footing that the landlord was not entitled to refuse his consent without some good ground; and holding that principle, I think the arbiter was entitled to say that the case was within his jurisdiction."

"With regard to the question of damages I have more doubt. Still I think it fairly fell under the arbiter's jurisdiction, and was a proper accessory to the decision on the other point of the case."

"I go on the ground that the matters settled by the arbiter were specially described in the lease as matters to be referred to him, and not on the ground that a general obligation to refer is transmissible against singular successors."

L. Jeffrey concurred on the point of homologation, but observed, *inter alia*: "I rather agree with L. Fullerton, that a general clause of reference does not bind a singular successor as to matters of the nature described by his Lordship. I do not think a singular successor would be called upon, by such a general clause, to submit to the decision of an arbiter on such a question as that raised in the case of the Duchess of Sutherland, viz., whether the tenant was entitled to retain a portion of his rent as remuneration for acting as ground-officer, or in any other capacity. But the question is, Is the stipulation now in question a matter referable to the general relation of landlord and tenant, and to the *essentialia* of the contract of lease?" His Lordship then stated the particular grounds on which he held that the dispute between the parties, in this instance, "touches the *essentialia* of the contract, as to the proper working of the coal, and so falls within the jurisdiction of the arbiter. On that point I have no doubt."

[1] Per L. Fullerton, in Montgomerie, *supra*. See also opinion of L. Jeffrey, *ibid.*

effect, as a stipulation essentially inseparable from the whole substance of the right;" and, accordingly, it will transmit, along with the rest of the lease, as a real right, against singular successors.[1]

137. Where the parties intend to confer power on the arbiter, under a submission-clause, to determine on such claims of damages as may arise among the other disputed matters between them, it would appear to be advisable that they should not rely upon any general clause authorising the arbiter to decide "all disputes and differences," or the like; but should use explicit terms, giving him power to decide on claims of damages, *hinc inde*. Moreover, the power should be so conceived, as expressly to authorise the arbiter to assess the amount of damages, if he finds any damages to be due. It is true, that where the enforcement of a claim of damages, during the currency of a lease, will operate "to the advantage of the tenant or the landlord, in regard to matters of execution within the lease,"[2] there would appear to be good ground for expecting that the Court would hold the question to fall within such ancillary clauses of submission as those now under consideration. But, after the case of Blaikies (*infra*, sec. 138), parties who wish to give full powers to an arbiter to deal with incidental questions of damages, should be very explicit in bestowing these powers.

138. As the arbiter, who is intrusted with the power of determining on the party's liability for damages, must necessarily investigate the facts carefully, in order to enable him to decide that point, it must almost always happen that the same investigation places him in the best position for determining at the same time what the amount of the damages should be. This is so obvious, that it is difficult to suppose that parties could ever deliberately intend to leave the single point of the amount of damages to be determined by a jury trial, at the same time that they were empowering an arbiter, under a broad and comprehensive submission-clause, to settle all disputes between them, and to find either party liable in damages if he saw cause. Yet this has recently been the result of a partial reversal of a decision of the Court of Session by the House of Lords;[3] and it should have

[1] See opinions of L. Pres. Boyle, L. Mackenzie, and L. Ivory, in Montgomerie, *supra*.

[2] Per L. Ivory, in Pearson, *supra*, sec. 131, note. See also case of Montgomerie, *supra*, sec. 135, note, as to damages there awarded.

[3] Blaikies, Feb. 4, 1854, 16 D. 470; June 17, 1852, 24 Scottish Jurist, 537; and Jan. 28, 1851, 13 D. 527.

This case is important with regard to the construction of an ancillary submission-clause.

An extensive contract was made between the Aberdeen Railway Co. and Messrs. Blaikie of Aberdeen, "for the supply of cast and malleable iron work, rust, cement, white, metallic, milled, and sheet lead, patent lead pipes, and various other articles," conform to certain scheduled prices; all which the manufacturers were to supply "to the entire satisfaction of the arbiter hereinafter named." In the event of Messrs. Blaikie failing to provide the articles in the quantities, and within the times, fixed

the effect of inducing those who prepare a contract, containing an ancillary submission-clause, to be very explicit in stating the arbiter's

by the arbiter, he was empowered to take the contract out of their hands, and to employ others in their place.

The contract contained a clause submitting to Gibb, the company's engineer, as arbiter, "all disputes and differences which may arise between the several parties hereto, regarding the true intent and meaning of any of the provisions before written, or regarding the quantity, state, and condition of the materials hereby contracted for, or the quantities that may require to be actually furnished by Messrs. Blaikie, and generally all disputes and differences in any way connected with, or arising out of, the execution, or failure to execute, the work hereby contracted for, whether herein specially submitted or not."

During the progress of the work, the Railway Co. began to employ other parties to supply the articles in question, although they had not applied to the arbiter to take the contract out of the hands of Messrs. Blaikie. These gentlemen then lodged a claim with the arbiter, craving an order on the Railway Co. to implement the above contract by continuing to take from them the whole articles above specified which might be required for completing the railway, and also asking an award of damages for the breach of contract which they alleged had already taken place.

The Railway Co., besides objecting to the competency of the procedure before the arbiter, brought an action to have it declared that the claim made by Messrs. Blaikie did not fall within the submission, and that Gibb was not entitled to take proceedings therein, "or to judge or dispose of the claim made by Messrs. Blaikie, or to assess and fix the amount of their claim of damages." They also craved interdict against further procedure before the arbiter. Messrs. Blaikie stated, as their first plea in defence, that the questions raised by the declarator fell under the clause of reference to the arbiter, and therefore the action should be dismissed.

The arbiter proceeded with the submission, while the declarator was pending in Court, and first issued one interim award, by which he found the Railway Co. liable in damages; and afterwards another, by which he assessed the damages at £1704. A charge being given on this award, the Railway Co. presented a note of suspension, which was passed; after which the suspension lay over till the issue of the declarator.

In the declarator, L. Ivory, Ordinary, "in respect that, by the said submission-clause, the parties have duly submitted," etc., to Gibb, "all disputes and differences which may arise between them, 'regarding the true intent and meaning of any of the provisions' of said contract, and regarding 'the quantity, state, and condition of the materials contracted for, or the quantities that may require actually to be furnished' by Messrs. Blaikie, defenders, 'and generally all disputes and differences in any way connected with, or arising out of, the execution or failure to execute the work contracted for:' And in respect, further, that disputes and differences have arisen between the said parties, and that these disputes and differences do regard the true intent and meaning of the provisions of the said contract, particularly as to the extent and quantity of articles and materials requisite to be furnished in execution of the work contracted for, and which, accordingly, in due implement of said contract, the said defenders are bound to furnish, and the pursuers, on the other hand, are bound to take delivery of, and to pay for: Finds that the said disputes and differences do competently and properly fall to be extricated and disposed of by the said Alexander Gibb, as arbiter under the said submission-clause; sustains accordingly the first plea in defence maintained by the defenders," etc.

On a reclaiming note, L. Pres. Boyle, L. Mackenzie, and L. Cuninghame, considering the words of the submission-clause to be of the most comprehensive kind, concurred with the L. Ordinary. L. Fullerton differed, holding that the submission-

power, not only to find damages due, but to assess their amount, where it is intended to confer such power upon him.

clause included "not all disputes and differences which may arise on the construction of the contract, but only disputes and differences which might arise 'out of the execution or failure to execute the work;' *i.e.* if there be meaning in language, the differences and disputes regarding the way in which the work was done by the defenders,—the only party by whom any work was undertaken to be done under the contract. For the only obligation on the pursuers was, not to perform or execute any work, but solely to pay the scheduled prices for the work which was done by the defenders." His Lordship also observed that the contract between the parties imposed no express obligation on the Railway Co. to take their whole materials from Messrs. Blaikie, and that the "question of law," whether the Company were so bound under "a supposed legal implication," involved in the contract, was a question which he conceived the parties never intended to submit to the decision of the arbiter. The Court, accordingly, by a majority, adhered to L. Ivory's interlocutor. On appeal, L. St. Leonards, Chancellor, observed: "The main point was, whether or not the arbiter had, under the articles in question, a power to determine the construction of all the covenants and obligations in the instrument. That led to a consideration of what was the true construction of the agreement, although they are very distinct questions. The third question was, whether he had exercised properly the power which he assumed, of assessing the damages for the breach, and continuing to assess those damages."

"Now, my Lords, I am clearly of opinion that, by the true construction of the agreement, the parties were not bound to take all the materials which they required from the Company. But the question of the construction of the arbiter's powers is quite a different question; for if, by that clause, power is given to the arbiter to decide upon the true meaning of all the obligations, it is then perfectly indifferent what my opinion may be in regard to the true construction; because, whether he has decided erroneously or correctly, if he had the power, that must be the construction adopted."

"Now, my Lords, that is a mere question of construction, and not depending upon any rule of law. The words naturally import, no doubt, upon looking at them, that the arbiter had the power. Four judges of the Court below were in favour of that construction. My noble and learned friend (L. Brougham) is of opinion with the majority. My opinion, upon the true construction of the contract, certainly would be, that the arbiter had not the power; but, as the matter stands, it is a question simply of construction. It is an ambiguous clause; and there being so much authority in favour of the construction of the Court below, that part of the judgment of the Court below will be affirmed."

"My noble and learned friend and myself have both agreed that the arbiter has exceeded his power as regards the assessing of the damages, and therefore that part of the interlocutor which affirms his proceeding in that respect will be reversed; and the cause will be remitted to the Court below to do what may be just, and we will ask the learned counsel on both sides to draw up a minute of what they think should be the nature of that remit."

L. Brougham observed that he also differed from the arbiter in the construction which he had put on the agreement of the parties; "but that is wholly immaterial in this case, because the real point is, whether or not the parties did intend to submit that, among other matters, to the arbiter. My noble and learned friend and myself unhappily differ upon the second point. It is quite unnecessary to say whether we agree upon the first." "On the other point, namely, with respect to the assessment of damages, we are entirely agreed."

His Lordship further observed: "We consider this to be a question on the con-

CHAPTER V.

THE PECULIAR RULE, IN ARBITRATION LAW, WHICH PREVENTS THE ENFORCEMENT OF AN AGREEMENT TO SUBMIT, UNLESS THE ARBITERS BE NAMED IN THE AGREEMENT; AND THE LIMITATIONS OF THAT RULE.

139. An agreement to submit disputes and differences to one or more arbiters who are not named, is ineffectual in law. When a dispute has eventually emerged, and the very case has thus arisen for which it was meant to provide by the agreement, still, if either party shall, at his mere pleasure, refuse to name an arbiter, no means at present exist for compelling him to fulfil his obligation.

140. A series of decisions has firmly fixed this to be a general rule in the law of arbitration.[1] But it has been repeatedly observed on the Bench, that the grounds on which it rests are of an unsatisfactory character.[2] Nor can any reasonable doubt be entertained that its practical operation has been attended with great hardship, and has often defeated the plain object which was in the view of the parties when entering into important and onerous contracts. No remedy, however, can now apparently be applied, without the interposition of the Legislature.

141. Such an agreement generally forms part of another contract which, at the time when the dispute arises, either has been, or is in the course of being, implemented; nevertheless, the agreement itself remains practically ineffectual and inoperative.[3]

struction of an instrument, which is, to a certain degree, a question of law, inasmuch as these questions are for the Court, not for the jury; nevertheless, it is in the nature of a question of fact so far, that it is for the purpose of discovering what the intentions of the parties are, that you undertake the examination of that instrument."

The case was remitted, with a declaration that "the arbiter was not empowered to assess and fix the amount of Messrs. Blaikies' claim for damages." Under this remit, the Court of Session, holding that their interlocutor necessarily remained entire, unless in so far as it was altered, repeated the above declaration, and to that extent only altered the L. Ordinary's interlocutor above quoted.

It may be explained incidentally, that no resort to jury trial was eventually had for the purpose of assessing the amount of the damages, as the contract itself was ultimately set aside upon grounds which had no relation to arbitration-procedure.—Blaikies, July 20, 1854, 1 Macq. 461. [See also Milne and other cases cited in note, p. 78.]

[1] Buchanan, June 25, 1799 (14593); Davidson, Feb. 28, 1810, F. C.; Hendry's Trustees, May 28, 1851, 13 D. 1001; Milne, Feb. 15, 1770, 2 Pat. 209.

In France: "Le compromis désignera les objets en litige, et les noms des arbitres, à peine de nullité."—Cod. de Proc. Civ., 2e part., Liv. iii. sec. 1006.

[2] "The reasons why such submissions should not be effectual are nowhere very well explained," etc.—Per L. Mackenzie, in Smith, etc., Feb. 28, 1843, 5 D. 749.

[3] In the case of Buchanan, *supra*, the agreement to submit formed part of a contract of copartnery. In the case of Davidson, *supra*, it formed part of a contract

142. The foresaid general rule will still apply, although the arbiters are designated by description, as those persons who may be the holders of certain known public offices, at the time when the disputes shall emerge which are to be the subject of arbitration. Such specification still leaves it quite uncertain what particular individuals may be the actual holders of these offices at the time in question, and is therefore incompatible with any actual *delectus personæ*. It was accordingly held ineffectual to agree to submit any disputes which might emerge, "to the Chairman, Deputy-Chairman, and Secretary, for the time being, of the Chamber of Commerce of the City of Glasgow, or any two of them." Even in a purely mercantile question, arising out of a contract of copartnery, a party was found not to be barred by such agreement from pursuing an ordinary action in the Court of Session, just as if no such agreement had existed.[1]

143. Further, the foresaid rule will still apply, although the agreement contains a provision for the express purpose of meeting the event of either party's refusal to name an arbiter, by referring in that case to any party, to be named by a person who is merely designed as the holder of a certain public office;—as, for example, by referring "to any person to be named by the Sheriff of Lanarkshire (the Judge-Ordinary of the bounds), on the application of either of the parties,—which application either of the parties is hereby authorised to make, as sole arbiter in the premises."[2]

144. If the agreement to submit shall name the individual arbiter

between a builder and the heritors of a parish, for the erection of a church. In the case of Hendry's Trustees, the agreement occurred as part of a mineral lease. The case is noticed *infra*, sec. 143.

[1] Buchanan, June 25, 1799 (14593). Bell's Princ., sec. 391.

[2] A mineral lease contained the above clause; and disputes having arisen, and the landlord having refused to concur in naming arbiters, the tenant applied to the Sheriff of Lanarkshire, in terms of the agreement, who appointed a mining engineer as sole arbiter. The landlord then brought an advocation, and the L. Ordinary, Wood, remitted to refuse the tenant's application, with expenses. His Lordship observed, in a note: "A reference, not to a particular individual named, but to a person by description—to the person who may hold a particular office or situation—is ineffectual. And if so, it appears to the L. Ordinary that a general reference, of the kind in question, cannot be bindingly made, by delegating, not to a third person named, but to a party who may, at some future time, fill an office, or answer to a description, to nominate an arbiter."

A reclaiming note was presented, but the Court unanimously adhered. L. Fullerton observed, that he concurred with the L. Ordinary, who, "as a reference directly to 'the Sheriff of Lanarkshire' would have been bad, concludes that a reference to that official character to name an arbiter is a step further in the removal of the appointment from the direct nomination of arbiters by the parties."—Hendry's Trustees, May 28, 1851, 13 D. 1001.

[In one case the appointment of an umpire by "description of office" is now sanctioned by the Legislature; 35 and 36 Vict. c. 46, sec. 1, § 1.]

or arbiters, it is no objection that the disputes or differences which are to form the subject of arbitration are future or contingent merely, and have not yet emerged. The agreement is, nevertheless, effectual and binding.[1]

145. There is, however, a special class of agreements to submit, which the Court will enforce against the parties, although arbiters have not been named in the agreement. Such agreements do not contemplate the decision of proper disputes between the parties, but the adjustment of some condition, or the liquidating of some obligation, contained in the contract of which such agreement to submit forms a part. In such circumstances, unless the agreement to submit was enforced, the contract to which it effeirs could not be extricated or carried into effect.[2]

146. Thus, in the case of a sale, where it forms part of the contract that the price to be paid shall be such sum as shall be fixed by arbiters mutually chosen, the agreement to submit the determination of the price is effectual in law, although the arbiters have not been named. Were it otherwise, the contract of sale itself would remain inextricable.[3]

[1] It is probably unnecessary to quote any cases in respect to a rule which is so frequently exemplified in practice. See M'Caul, March 1, 1831, 9 S. 522; Robertson, Jan. 22, 1835, 13 S. 289, etc.

[2] [The result of the various cases referred to in the text and notes may be briefly stated thus—(1.) In every case a submission to the "future holder of an office" is void from uncertainty. (2.) If the agreement to submit is not ancillary to another contract and necessary for its extrication, the arbiters must be personally named, or at least clearly designated. (3.) An agreement to refer future disputes to arbiters to be mutually chosen is binding when ancillary to another contract and necessary for its extrication.—The reason assigned for the first of these rules is the absence of *delectus personæ;* but, in the attempted submissions of the kind which have occurred, although no physical individual was named, the parties advisedly selected a well-defined jural *persona* ("Sheriff of Lanarkshire," "Chairman of Chamber of Commerce," etc.), specially fitted for the office of arbiter. Such submissions would therefore appear to be quite compatible with the doctrine of *delectus personæ* in a wider sense than that in which it has been hitherto understood. It is also noteworthy that in one case the Legislature sanctions the appointment of an umpire "by description of office" (*supra*). With regard to the second rule, there seems to be no good reason why a simple undertaking to refer a dispute to arbitration, without a *de præsenti* nomination of arbiters, should not be as binding as any other contract. As to the application of this rule, see the instructive case of the Elgin Lunacy Board *v.* Bremner and Elder, cited at p. 45 (1 R. 1155, and 2 R., H. L., 136), where the strict Scotch interpretation of the rule was rejected by the House of Lords. In that case L. O. Shand and the four judges of the Second Division were unanimous in holding that the reference was bad, having been made to a fluctuating and uncertain society; but the House of Lords held that the reference was good, the society being quite clearly designated, although none of its members were named.]

[3] See authorities, *infra*, sec. 147. [The authorities cited in the following note appear to warrant the doctrine laid down by the text, but it is worthy of remark that none of them apply to the simple case of a contract of sale. In all these cases the

147. In like manner, in the common case of a lease, containing an agreement that, at the expiry of the lease, the tenant shall have his stocking taken off his hands by the landlord, at a valuation to be fixed by two men mutually chosen; or an agreement that, if the tenant be removed during the currency of the lease, he shall be allowed such compensation as shall be fixed by men mutually chosen; or an agreement that, if a landlord should wish to avail himself of a break in the lease, the tenant should nevertheless have right to remain, on paying such additional rent as should be fixed by two men mutually chosen;—these or the like agreements will be valid and effectual, although the arbiters are not named. The Court will enforce the obligation, in the event of either party refusing to name an arbiter.[1]

parties were already bound by an antecedent contract; the clause of submission was of an executorial character; the contract had been entered into, and partially executed, on the faith of the validity of the submission-clause; *res non erant integræ;* had the obligation to refer to arbiters to be mutually named been declared inoperative, great hardship, if not ruin, would have been caused to one of the parties. In these circumstances the Court held that the obligation should be enforced, or relief otherwise afforded, in order that the contract might be extricated. If, on the other hand, the sole contract were one of sale at a price to be fixed by two arbiters to be mutually chosen, none of the above grounds of judgment would apply. The fixing of the price would be a condition precedent to the parties being bound. In such a case, justice would certainly require that the obligation to refer should be enforced; but if the arbiters named should disagree, if they are not empowered to name an oversman, and if either of the parties should decline to name another arbiter, it would seem that the contract of sale could never come into operation. Both parties having implemented their primary obligation to nominate an arbiter, and this mode of fixing the price having failed, the conditional contract would be at an end; *res fuerint integræ;* there would be no contract to extricate, and no hardship or loss could ensue. In a case of this kind it is therefore improbable that the Court would interfere to make a new contract for the parties. By the later Roman law, a contract of sale at a price to be fixed by a third party became binding as soon as the price was so fixed; but, if the arbiter could not or would not fix a price, the contract was at an end.—Gaius 3. 140; Inst. 3. 23. 1; Cod. 4. 38. 15.]

[1] Land was let seven years on condition, *inter alia*, that the landlord should have power to resume possession during the currency of the lease, the tenant being "bound to cede possession of the same, on being allowed such compensation, for whatever number of the said seven years may then be to run, according as the same shall be ascertained by men mutually chosen for that purpose." The landlord resumed possession, and the tenant and he made a reference of the amount of compensation to two arbiters, who gave forth an award. The tenant then raised an action to reduce the award, in respect of certain irregularities, and to claim compensation in Court for the interruption of his possession. The award was reduced; but, with respect to the conclusion for compensation, the landlord objected that the agreement to submit was still in full force, being the prescribed method of liquidating an important obligation in the contract of lease; and that the tenant was bound to concur in naming new arbiters. The Court, after considering minutes of debate, unanimously affirmed the interlocutor of the L. Ordinary, Cockburn, which found "that the pursuer is not entitled to demand either a proof by commission or on a trial, but is bound to concur with the defender in the nomination of 'men

148. A stipulation is not unfrequently introduced into a lease of coal, that the tenant may relinquish the lease whenever, in the opinion of skilful men mutually chosen by the parties, the coal shall

mutually chosen,' to ascertain the compensation due," etc.; and appointed "each party to name a man to whom a remit may be made, within eight days."

At the advising in the Inner House, L. Mackenzie distinguished three sets of cases, and observed that, as to the first, in which disputes had already arisen, and as to the second, in which disputes were contemplated as likely to arise, he "would have had great difficulty in sustaining a submission, or agreement to submit, to parties not named. The reasons why such submissions should not be effectual, are nowhere very well explained," etc.—"But a third set of cases is to be distinguished from either of these,—where no difference has arisen, or is contemplated as likely to arise; but where neither the one party nor the other knows the value of a particular subject, and where it is necessary that they shall have a valuator. A reference, in such cases, made beforehand, in order to make a bargain, differs from either of the other two classes of cases. It takes place in sales. A sale may be made by a reference of the price to one of the parties. The Roman law held that to be a good sale, and I don't think it illegal. But suppose it is agreed that two persons shall be named to fix the value of the article agreed to be sold, I don't see why it should not be good, in order that the bargain may be carried through. If this is the case in the contract of sale, why should it not be in other contracts? There are other contracts, of great importance, in which agreements of this sort are common in practice; for instance, in the contract of lease, where a party agrees to take stocking at a valuation. Such agreements occur perpetually. The universal practice in the Sheriff-Courts, I believe, is to enforce them. I have a strong impression that a general finding by us—that a reference in a contract of any kind, to a referee not named, is null—would be attended with the most serious consequences."

L. Fullerton: "The distinction is quite obvious. The only puzzle about it arises from not looking at the sense in which the words, 'part of the contract,' are used in the cases. There are cases in which the subject referred may be called 'part of the contract,' as in the case of the Magistrates of Edinburgh.[1] But in the class of cases which are similar to the present, the words, 'part of the contract,' are used in a different sense; meaning that the reference is necessary to liquidate the obligation come under by the contract. When the price is to be fixed by reference, that is not a dispute arising between the parties; but something necessary to liquidate part of the contract. When the reference is essential to liquidate the obligation come under by the party, it is good, though to a person not named. If not, what would become of the obligation? Nothing is fixed by the contract; and if it is not to be fixed by a reference, there would be no obligation at all. There is no authority against such a reference."

L. Jeffrey concurred, but not without difficulty.

L. Pres. Boyle thought the distinction between the respective sets of cases was well established, and concurred with the other Judges. Smith, etc., Feb. 28, 1843, 5 D. 749.

This important and rather subtle question received further elucidation in the case of Hendry's Trustees, May 28, 1851, 13 D. 1001. A submission-clause in a mineral lease provided, that "in case any disputes or differences shall arise" "as to the true intent and meaning of these presents, or as to the construction or implement of any of the prestations, provisions, and others before written, etc., or as to any other matter or thing, in any manner of way, arising out of, or in connection with, the present lease, the same shall be and are hereby referred" to certain per-

[1] Milne, Feb. 15, 1770, 2 Pat. 209.

have become incapable of being worked to advantage. Under such a clause, though the arbiters are not named, the parties are nevertheless bound to adopt their contract-method of ascertaining the workability of the coal, when that question may require to be determined.

sons named; whom failing, to any person to be named by the Sheriff of Lanarkshire. It having been necessary to apply to the Sheriff to name an arbiter, the above provision (as already noticed, sec. 143) was held not to be binding.

At disposing of the case, L. Fullerton observed that it was an ordinary rule, that "a general submission to arbiters not named, could not be sustained;" but that there was "an exception to the general rule, which applied only in cases where the ascertainment of a point, essential to the extrication of a special stipulation in the contract, is made part of the stipulation itself: as, for instance, when parties bind themselves to pay and receive a sum, to be fixed by men mutually chosen: or to accept their opinion as the criterion of the existence, or non-existence of some contingency, on which the obligation of the parties is, by the contract, dependent." But his Lordship held that these circumstances did not apply to the case of an application to the Sheriff (in terms of the agreement) to name an arbiter, "in a submission as general as can well be conceived."

In this case, besides the above very comprehensive clause, there was a separate and specific provision, that at the close of the lease, the tenants should offer the machinery to the landlord "at the price to be put thereon by two neutral men, to be mutually chosen by the parties, which failing, by the Sheriff of Lanarkshire."

L. Ivory remarked on the distinction between these two several clauses, observing that, if an offer of sale of the machinery had been made in terms of the lease, "the question must have been extricated by reference to two men of skill;" and added: "The purpose of the submission is not to ascertain what the lease stipulates, but arises out of matters which infer non-performance or neglect. Questions as to the liquidation or extrication of the stipulations of the contract, are the kind of matters which the authorities have dealt with, as forming part of the contract; and if the question does not fall within that description, it cannot be brought under the exception to the rule which requires that the arbiters should be named. If the submission is not an essential part of the contract, it falls under the general rule, that there can be no good submission of this general nature, to parties of whom there is not a direct delectus."

See a point connected with this subject, involved in the disposal of Cochrane, Feb. 3, 1859, 21 D. 369.

The case of Munro, Dec. 18, 1823, 2 S. 508, also belongs to this class. A landlord, in 1816, resumed possession, during the currency of the lease, under a clause which enabled him to do so, on taking over the tenant's stock of sheep at a valuation, to be made "by two persons to be mutually chosen." In 1820, the tenant raised an action for the value of the sheep, and the L. Ordinary remitted to a man of skill to ascertain and report on their value as at the time of delivery. His Lordship afterwards decerned in terms of the report. The defender reclaimed, and craved a remit to the Jury Court. But the Court adhered; holding "that it was part of the agreement that the value should be ascertained by valuators; that it was the fault of the landlord that a valuation had not been made in 1816; and that this was the only mode of extricating matters, and was, besides, the best evidence" in the circumstances.

It is true that in this case there was no actual remit to mutual valuators in terms of the agreement in the lease; such remit being, in the circumstances, impossible. But the existence of the agreement was recognised by the Court as an important element in enabling the tenant to object to any remit to the Jury Court;

It is the specific mode of carrying out the contract of lease itself, and clearing the tenant's right to relinquish his lease, when it emerges, on the one hand, and the landlord's obligation to accept the relinquishment on the other.[1]

and there seems to be no reason to doubt that, if the question had come before the Court, immediately on the landlord's resumption of possession, the agreement would have been literally enforced.

On this subject, the case of Wallace, July 20, 1715, 5 Suppt. 7, is interesting, as it shows that the enforcement of this class of obligations to submit is not of novel introduction into the law of Scotland. Sir T. Wallace set his salt-pans for twenty-one years, with an option to either party to be "free at the end of ilk seven years," on certain notice. The tack further contained a clause, "That in case at the first, or any other freedom, during the said tack, Sir Thomas should not incline to keep the tack in the terms above mentioned, that he obliged himself to stand to the determination of two indifferent men, mutually to be chosen by him and the tacksmen, as to what augmentation of tack-duty they should be obliged to give during the space of the next freedom; and in case of variance, an oversman was to be chosen by them." Sir Thomas attempted to remove the tacksmen at the close of the first septennial period. They pleaded, *inter alia*, that they were ready to name an arbiter under the above clause, and that Sir Thomas was bound to name another, who should fix what additional tack-duty was to be paid by them for the next seven years. Sir Thomas answered, *inter alia*, that such a submission "would come to nothing, for the pursuer can name such arbiters as will never comply (concur?) either in the decision or the choice of an oversman."

The Court found, "That the defenders being willing to submit to a further tack-duty, and name an arbiter, the pursuer was also bound to name another; and the Lords did limit a time for the parties to name their arbiters, and a further time to pronounce their decreet-arbitral; and superseded to determine in the removing, till both terms were elapsed."

[See also opinion of L. Benholme in Campbell *v.* Shaws Water Co., June 2, 1864, 2 Macph. 1130.]

[1] In a lease of coal with a fixed rent, it was stipulated that, "in the event of the coal becoming exhausted, or that by unforeseen accidents, etc., it shall become, in the opinion of skilful men mutually chosen by the parties, incapable of being wrought to advantage," the tenant might relinquish the lease. Two men of skill were then mutually chosen, who inspected the coal, and differed in opinion on the point submitted to them. The tenant thereon brought a declarator that he had a right to relinquish his lease, alleging that, in point of fact, it could not be worked to advantage, and offering to prove this to the satisfaction of a jury. The landlord objected that this was a point peculiarly fit to be ascertained by men of skill, after themselves inspecting the coal; that, by the special agreement of the parties, it was not to be sent to a jury, but to be determined by men of skill, mutually chosen: and that it was only a report by two men of skill which could purify the condition of the tenant's right under the contract to relinquish the lease. The tenant answered, that the agreement to refer this point to men of skill could not practically be enforced, as the arbiters were not named; and that, at any rate, as each party, before naming any future arbiter, might perhaps find the means of knowing his views on the point in question, there would probably always be a difference of opinion between future arbiters, as there had already been between the two arbiters who were originally appointed.

The Court assoilzied from the declarator, holding that the parties had, by special agreement, excluded this question from the tribunal of a jury, and fixed, as a con-

149. Such an agreement to submit was not held to be either satisfied or evacuated, although arbiters had been named under it and had pronounced an award; the award itself having been reduced. In such circumstances the Court held the agreement to be still in force, and that it had not received due implement; and they accordingly ordained each party to fulfil his own obligation by naming an arbiter.[1]

150. In like manner, such an agreement to submit was not held to be exhausted or evacuated by the circumstance that two arbiters had once been named by the parties who accepted the office, but found themselves unable to agree in opinion. The Court held the

dition of the tenant's right to relinquish the lease, that there should first be obtained a report by two men of skill, to the effect that the coal could not be wrought to advantage. Dixons, June 25, 1830, 8 S. 970.

A similar question was more recently raised in Merry and Cunningham, July 15, 1859, 21 D. 1337; [June 7, 1860, 22 D. 1148; affd. March 26, 1863, 1 Macph., H. L., 14.] In that case the Judges differed in opinion, and a perusal of the views delivered from the Bench will be found highly instructive.

It is material, at the same time, to observe, lest the difference of opinion on the Bench, in this case, should be supposed to be greater than it really was, that all the Judges approved of the principles laid down by L. Fullerton in Hendry's Trustees, when pointing out instances illustrative of the application of that exceptional rule which sustains the validity of an obligation to submit, although no arbiters are named in the obligation. Therefore the authority of that case, and of others which involve the same principles, remains not only unshaken, but confirmed by all the Judges in the case of Merry and Cunningham.

Adopting the doctrine which was enunciated in Hendry's Trustees, a question still remained in the case of Merry, which was of an entirely special nature, viz., the sound construction of the 10th Article in the "Heads of Agreement" for a lease (which contained the agreement to submit), to the effect of thereby determining whether the case of Merry fell within the foresaid exceptional rule. On this particular question, which cannot again arise, unless in regard to the construction of some other submission-clause conceived in precisely the same terms with the foresaid 10th Article, their Lordships differed in opinion: the L. J. Clerk Inglis holding that, according to its sound construction, it was "a mere obligation to refer, independent of the stipulation as to the right to abandon the lease on the occurrence of certain events;" whereas Lords Wood, Cowan, and Benholme held that the foresaid 10th Article was so expressed, that "the reference is made essential to liquidate the obligation come under, and is therefore, agreeably to the conception of the contract between the parties, the only mode in which it can be liquidated."

It seems important to keep this in view, because otherwise it might be supposed that a valuable rule, of much practical use in a difficult department of arbitration law, had itself been called in question; whereas the question affected not the soundness of the rule itself, but merely its application to a particular submission-clause.

The Court, by a majority, held that "there was constituted a valid and effectual obligation to refer to arbitration the question, Whether the minerals let are workable only at an evident loss?" although there was no nomination of arbiters in the submission-clause.

[1] Smith, Feb. 28, 1843, 5 D. 749.

agreement to be still in force; and refused to send the determination of the point in question before a jury.[1]

151. Such an agreement to submit will also, in the general case, remain in force notwithstanding the death of one of the parties. The agreement is part and parcel of another contract, and, in the ordinary case, has an equal endurance with the primary contract;[2] so that, when the primary contract transmits against the representatives of a deceased party, so likewise will that part of the contract which consists of the agreement to submit.

152. It should be observed, that, unless where parties agree to the nomination of a sole arbiter, or else provide for the appointment of an oversman where there are two arbiters, great practical difficulty may be experienced in making the submission-clause effectually operative for the extrication of the contract.[3] In the case of Merry and Cunningham, already noticed, a difficulty of this kind occurred. The 10th head of Articles of Agreement for a lease provided, that the tenants might give up the lease, if the minerals became only workable at an evident loss, "on the same being ascertained by arbiters mutually chosen." After it had been found by the Court that this constituted a valid and subsisting agreement to refer, although the arbiters were not named, it was contended by the pursuers, that, according to the true and *bona fide* import of the agreement, parties were bound, in naming arbiters, to insert a clause providing for the devolution upon an oversman, in the event of the arbiters differing in opinion: because, otherwise, the agreement would, not improbably, be abortive and inoperative. The action also concluded alternatively, "in the event of the submission becoming, from any cause, inoperative or ineffectual, to have it found and declared that the minerals had become workable only at an evident loss;" upon which being so found, a declarator of the pursuers' right to renounce their lease was further concluded for. The defender answered, that the Court could only ordain implement of the contract of parties, such as it was; they could not make a new contract for the parties. But it would, in effect, be a new and different contract which would be imposed on them, if the Court ordained any provision to be made for appointing an oversman, the parties themselves never having agreed to do so. As for any ulterior procedure, in the event of the contract-remedy proving abortive, there was no foundation for it; and, at all events, it was premature to consider it.

153. The opinions of the whole Court were taken on the question, whether the Court could ordain the parties to provide for the appoint-

[1] Dixons, June 25, 1830, 8 S. 970, *supra*, sec. 148.

[2] See *supra*, chap. 4, sec. 127, *et seq.*; case of E. of Selkirk, sec. 156, *infra*. See also opinion of L. Mackenzie, in Watmore, May 17, 1839, 1 D. 743.

[3] See Dixons, *ut supra*.

ment of an oversman, in the event of the arbiters differing in opinion. The Judges held that the Court possessed no power to make such an order. L. Pres. M'Neill, in delivering his opinion to this effect, took occasion, at the same time, to advert to the possible contingency of the arbiters differing in opinion, and the submission-clause being thereby rendered inoperative. His Lordship observed: "No provision is made for the case of the arbiters differing in opinion, or for the case of the arbitration becoming abortive from any other cause. But it does not from thence follow, that the 10th Article is to be wholly disregarded; nor does it follow that, in the event of the minerals being workable only at an evident loss, the tenants are to have no relief from the payment of rent, unless arbiters, mutually chosen, shall concur in opinion that such is the state of the minerals."

"The question whether the minerals let are workable only at an evident loss, must, in the first instance, be referred to two arbiters, one chosen by each party. If these arbiters shall agree in opinion, their award may be conclusive. If they shall not agree, or if the reference shall in any way prove abortive, it will then be for the Court to determine as to the course to be adopted for the ascertainment of the fact. I am of opinion that it will be competent for the Court to order the state of the fact to be inquired into; and I think that the conclusions of the present summons may be found sufficient to enable the Court to do so."[1]

154. All the other Judges concurred in these views; and the Court found, "that, according to the true construction of the 10th Article of the Heads of Agreement, the question whether the minerals are exhausted, or workable only to an evident loss, must, in the first instance, be referred to two arbiters, one chosen by each party; and that the defender is under no obligation to enter into and execute a deed of submission, containing a clause providing in any way for a devolution of the submission on an oversman." Their Lordships, at the same time, superseded consideration of the remaining conclusions of the summons, in respect that the parties had now named arbiters; and the result of that proceeding was, *ante omnia*, to be waited for, at least for a reasonable time.

155. It is perhaps scarcely necessary to remark, that any submission-clause in a lease (or other contract) which is not in favour of a sole arbiter, should carefully provide for the appointment of an oversman in the event of the arbiters differing in opinion. Even although the Court incline to hold that they can provide a remedy, in the event of the arbiters differing in opinion, and being unable to pronounce an award, it will nevertheless save a great deal of time and money, besides being probably a much more satisfactory arrangement in itself,

[1] [22 D. 1155.]

if the parties are sufficiently provident, at entering into their agreement, to regulate this matter for themselves.

156. It may be noticed that, when the Court have formerly had occasion to consider (with regard to a different *species facti*) their power of interposing to assist the *bona fide* extrication of an agreement to submit, some opinions were expressed which appeared to indicate that the Court possessed a certain authority, if it should become necessary to exercise it.[1] But it does not seem that the Court have ever yet taken any definite measures in this direction. The parties, on learning the views of the Court, have adopted some practical course for themselves, which rendered the special interposition of the Court unnecessary.

[1] In the case of E. of Selkirk, Jan. 17, 1778 (627), Hailes' Dec. 780, after a party had sold lands under an agreement by which the price was to be fixed by arbitration, and after the party had received payment of part of the price, he died before the arbiters had made their award. A question was thereafter raised, between the purchaser and an adjudging creditor of the deceased seller, whether the contract of sale was not evacuated by the seller's death and the alleged fall of the submission, before the price had been fixed by the arbiters; or whether the arbiters were still empowered to proceed and make their award of the price, so as to extricate the contract of sale as a completed bargain.

"The Court were of opinion, that the reference was binding on the heir, and that he was obliged to admit the price fixed on by the arbiters after the death of the referrer; they therefore 'found, that there was sufficient evidence of a completed bargain.'"

L. Pres. Dundas: "*Res non est integra* by any means; much money had been actually paid in part of the price. Had the arbiters died, the Court might have named other arbiters."

L. Braxfield: "The only question is, whether there was truly a bargain? and whether L. Selkirk may proceed to adjudication in implement? Where a submission is once entered into, and part of the price paid, *res non est integra*. The death of the arbiters would not vary the matter, for the Court might interpose."

[See also note 1, p. 88.]

In Reid, Dec. 15, 1826, 5 S. 140, an award was reduced; but the reference under which it was pronounced did not fall, because it formed part of another agreement. The referee, however, had disqualified himself, and the Court refused to sanction his acting again. One of the parties was unwilling to proceed with the reference, and wished to have matters decided in Court. Opinions were then expressed by the Court, that the reference might still be carried into effect, though not before the same referee. On hearing these views, the parties themselves named new referees.

BOOK II.

THE PARTIES TO THE CONTRACT OF SUBMISSION, AND THE SUBJECT-MATTERS WHICH MAY COMPETENTLY BE SUBMITTED TO ARBITRATION.

CHAP.
I. The Parties to the Contract of Submission.

CHAP.
II. What subjects may competently be submitted to Arbitration.

CHAPTER I.

THE PARTIES TO THE CONTRACT OF SUBMISSION.

157. In a larger sense, not only the parties-submitters, but also the arbiters and oversman, may be regarded as contracting parties in a submission. The latter come under important obligations to the former by the act of accepting their respective offices under the submission. But in the more ordinary sense, the parties-submitters alone are spoken of as the parties to the contract; and it is in that sense that these terms are now used.

158. All persons may enter into a contract of submission, who are under no disability in adhibiting an obligatory consent to a personal contract.[1] But it is requisite to an effective award, that the parties should possess full power over the subjects which are submitted to

[1] "Illi demum possunt compromittere, qui possunt efficaciter obligari."—Pothier ad Pand., L. 4, t. 8, sec. ii., art. 1, sec. 5.

"Compromittere possunt qui liberam habent rerum administrationem."—Voet. ad Pand., L. 4, t. 8, sec. 4. The chief exceptions from the general class of persons competent to enter into submissions, were thus stated in the Roman law:—"Non tamen recte compromittunt furiosi, servi, mulieres, quoties compromittendo intercedunt, vel cum maritatæ essent mariti consensu, ex moribus nostris, sunt destitutæ. Similiter, nec impuberes sine tutoris, nec minores sine curatoris sui auctoritate." "Plane, de rebus immobilibus, hi, ne tutore quidem vel curatore auctore, recte compromiserint." As a general rule, those who could transact could submit; "cum transactionis et compromissi videatur par ratio."—*Ibid.* sec. 5.

See 1 Bankt. 23, secs. 17 and 3.

"Toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition."—Code de Proc. Civ., 2e part. Liv. iii. sec. 1003.

arbitration; to the extent, at least, to which the award shall ultimately affect these subjects. Because the award of the arbiter, however absolutely expressed, can possess no inherent force beyond that which is derived from the joint mandate of the contracting parties, who delegate to him the office of determining between them.

159. Any man, or unmarried woman, of full age, may be a party to the contract of submission. An unmarried woman who is major, being *sui juris*, can enter into a contract of submission, as she can into any other lawful contract.

160. A husband cannot effectually enter into a submission respecting his wife's heritage, unless in concurrence with her as the true party.[1]

161. A married woman, with consent of her husband, may become a party to the contract of submission. She may do this, not only where her heritage is the subject in dispute, and where she is necessarily the proper party concerned, but also where it is a moveable claim,—such, for example, as her legitim,—in which it is usual (though not indispensable)[2] to state her as the party along with her husband. Accordingly, there are various cases in which a married woman, with consent of her husband, has been a party to a submission, and in which the award was sustained, notwithstanding that every effort was made, on various grounds, to set it aside.[3]

162. But as the law has fenced a married woman with certain personal privileges, and has disabled her from undertaking certain personal obligations, *stante matrimonio*, unless in some exceptional cases, the effect of this protection remains entire to her, however absolute may be the terms in which she binds herself to implement the arbiter's award, or however unqualified may be the decerniture against her, which the award may contain. Though all the procedure in the submission be formally correct, and the award be unchallengeable under the Regulations 1695, its legal force necessarily suffers that limitation in its effect against a married woman, which the public law of the country declares to be inseparable from her personal status.

163. Thus, for example, it is a general rule that a married woman cannot, even with consent of her husband, grant a valid personal obligation or bond, binding herself to pay a sum of money. And, accordingly, although she should, with her husband's consent, become

[1] MacCallay, June 15, 1821, 1 S. 70. [2] Macdougal, Feb. 20, 1858, 20 D. 658.

[3] Tailfer, Jan. 21, 1735 (5657); Tait, June 4, 1831, 9 S. 680. In the last case, a superfluous deed of discharge, extorted from a married woman by nimious diligence, done upon an award, was reduced; but the submission and award were sustained.

See case of submission between a husband and wife, which was entered into relative to a deed of voluntary separation, for the purpose of having an award to fix the amount of aliment to be paid by the husband to the wife, and to dispose of other accessory questions.—Shand, Feb. 28, 1832, 10 S. 384.

a party to a submission respecting a claim made against her for payment of a sum of money, and should unqualifiedly bind herself to implement the award of the arbiter; and although the arbiter should, in express terms, decern her to grant bond obliging herself to pay down a given sum, she would be under no obligation to grant such bond; and even if she did grant it, the bond itself would be a nullity, notwithstanding the terms of the award. Because the law of the country, on grounds of public policy, has declared that a bond for a sum of money, granted by a married woman, whether with or without the consent of her husband, is null and void;[1] and no individuals, by their private compact, whether in the form of a contract of submission or otherwise, can overturn the public law of the country.

164. But there are a few classes of exceptional cases in which a married woman can, of herself, grant a valid personal obligation; as, for example, when her husband has left the country, and she has engaged in trade for her own support. Any bond or bill granted by her for debts which she has thus incurred as a trader are valid, and may be made the ground of action or diligence against her person and estate.[2] It would seem to follow, therefore, that in regard to all disputes arising out of these trading transactions, either with respect to debts claimed by her or against her, or otherwise, she could competently enter into a submission with the opposite party, and effectually bind herself to implement the arbiter's award. If the arbiter should decern in her favour, she could competently raise action or diligence, in her own name, upon the award; if the arbiter should decern against her, action or diligence could be competently raised against her. Were it otherwise, she would be exposed to the singular hardship of being wholly debarred from settling mercantile disputes by arbitration, however much she might desire it, and of being compelled in all cases to resort to a Court of law.[3]

[1] 1 St. 4. 16; 1 Erak. 6. 25; Bell's Pr., sec. 1611.

[2] Churnside, July 11, 1789 (6082); Orme, Nov. 30, 1833, 12 S. 149.

There are other special circumstances in which a married woman can grant an effectual personal obligation; and, so far as these extend, it would appear that the doctrine stated in the text would equally apply.

[3] In England it appears to be held that, in those cases in which "a married woman is authorised to carry on business as a sole trader," she might "refer disputes respecting her business to arbitration."—Russ. 18, [4th ed., 15]. It would appear, also, that in England, if a party enters into a submission with a married woman, knowing her to be such, and an award is ultimately pronounced against him, he will be held barred by personal exception from afterwards objecting the want of her husband's concurrence, if he has kept up that objection till then.—Russ. 19 and 297, [4th ed., 16, 283].

As this doctrine is rested, not upon any technicality, but upon general principles of equity, it might be expected that effect would equally be given to it in Scotland. See note by L. Ardmillan, upon an analogous case of personal exception, in Orrell, Feb. 22, 1859, 21 D. 556.

165. In like manner, if there were a disputed question with a married woman, whether she was bound to grant a disposition of certain lands of hers, which she was alleged to have sold with her husband's consent, then, as she might lawfully, with such consent, sell her lands, and become bound to grant a disposition thereof, so she might, with her husband's consent, effectually become a party to a contract of submission relative to that question. And in the event of an award being pronounced, decerning her to execute the disposition, she would be liable to action or to personal diligence upon the award,[1] *ad factum prestandum.*

166. In short, whatever a married woman, with consent of her husband (or, in some cases, even without it), can effectually bind herself to do, by any direct deed, she may equally (with the same consent, when necessary) be rendered liable to do, through the less direct medium of becoming a party to a contract of submission, in which the arbiter gives an award against her.

167. In so far as a married woman can competently become a party to a submission, the question of her liability to diligence, both in her person and estate, or only in her estate, under the arbiter's award, will depend on the same rules as if she had, herself, directly granted a deed of the same tenor with the decerniture against her, which is contained in the award. Her liability to diligence will neither be greater nor less, in consequence of her obligation having been liquidated and constituted through the medium of a submission and award. But the precise limits within which a married woman may bind herself or her estate do not belong to the law of arbitration more than to any other branch of the law of contract. They properly pertain to the law of husband and wife, and will be found fully discussed by the writers on that subject.[2]

168. It has been said that a "submission, entered into by an unmarried woman, falls by her marriage."[3] And certainly, if the husband neither makes appearance in the submission, nor receives notice to appear for his interest, the subsequent procedure would be irregular, and the award would be liable to fatal challenge. But if the doctrine just quoted be carried further than this, it seems to be very open to question.

169. As a woman can undoubtedly enter into a submission, while

[1] Anderson, July 27, 1775 (6081); 1 Ersk. 6. 19; 1 St. 4. 14. See also Tait, *supra*, sec. 161, note 3, where the objection taken was not to the competency of enforcing, by personal diligence, a decerniture in an award against a wife, *ad factum prestandum*, but to the particular deed which she was there required to sign, as being one which, in the circumstances, it was superfluous and nimious to demand from her.

[2] 1 Ersk. 6. 16, *et seq.* See also 1 Fraser 245, [2d ed., 519], *et seq.*; and authorities there quoted.

[3] 1 Fraser 242, [2d ed., 513].

she is single and acting alone, and as a submission is an onerous contract, it would be anomalous if the mere circumstance of her supervening marriage, while a submission is pending in which she is a party, should have the effect of annulling the contract of submission, more than it would annul any other of the lawful contracts into which she may have entered as a spinster. If she had, as a spinster, signed bonds or bills, which were current at the date of her marriage, these obligations (albeit strictly personal, and, moreover, for the payment of money) would not fall by the marriage: they would merely be subject to modification, in regard to the legal execution which they could warrant against her person or estate, in her new status of a married woman; and, further, in regard to their effect upon her husband's person and estate. And so, in like manner, the contract of submission should not, *ipso facto*, fall by the marriage,—occurring, perhaps, only after great expense and protracted procedure in the submission, and when an award might be on the eve of being pronounced. It would seem, on the contrary, that where the husband either made appearance in the submission, for his interest, or received due notice to appear, the procedure in the submission might, and should, regularly go on to an award.

170. The changes which are produced on a woman's status by marriage (so far as regards the question now under consideration) appear to be—(1.) That she is thereby placed under her husband's curatory; and (2.) That all her moveable rights and interests are thereby assigned to her husband. But neither singly, nor in combination, do these changes appear legitimately to infer the result, that a woman's marriage should, *ipso facto*, cause the fall of an onerous contract of submission to which she was a party.

(1.) Her passing under curatory would only render it necessary that due notice should be given to her curator, the husband, so that he might appear in the submission, and attend to her interests.

(2.) The assignation to the husband, which is implied in marriage, can scarcely make a greater change upon the legal relations of the wife *quoad* the contract of submission, than the assignation to the trustee of a bankrupt makes upon the legal relations of the bankrupt himself *quoad* such a contract. And in this last case it is fixed, that while, on the one hand, notice to the trustee is necessary, otherwise the subsequent procedure will be irregular and reducible;[1] yet, if notice be given to the trustee to appear for his interest, the submission may be regularly carried on to an award, whether the trustee complies with the notice or not.[2] And so, it is thought, in the event of a woman marrying, after having become a party to a contract of submission, the submission would not, *ipso facto*, fall; but the husband would be entitled, if he chose, and would be bound, if required by the

[1] Barbour, Nov. 21, 1811, F. C. [2] Grant, June 23, 1820, F. C.

other party, to sist himself, and carry on the submission.[1] But the point is not free from difficulty.

171. With respect to pupils and minors, it may often be as much for their benefit to submit to arbitration doubtful questions affecting their estates, as, confessedly, it is for the benefit of persons of full age to do so. And the law, without allowing them to lose the special privileges which, for their protection, are annexed to their lesser age, enables them to avail themselves, under certain modifications, of the contract of submission.

It may be convenient to consider first the case of pupils.

172. A tutor, whether nominate, or of law, or dative, may submit to arbitration any disputed question affecting the moveable estate of the pupil.[2] As the pupil possesses no legal *persona*, it is the tutor alone who is a party to the contract of submission.

173. However regularly the procedure in the submission may be conducted, and however unimpeachable the award may be under the Regulations 1695, the pupil possesses, by law, the privilege of chal-

[1] It was at one time considered that a married woman, being under her husband's curatory, could not act as a trustee, under a trust-settlement, even with her husband's consent; but it is now settled otherwise.—Stoddart, etc., June 30, 1812, F. C.; Watson, etc., May 11, 1825, 1 W. & S. 188.

In like manner, it used to be thought that, if a woman held a lease, excluding assignees, it necessarily fell, *ipso facto*, upon her marriage. The contrary is now well established.—1 Hunter, p. 196, [4th ed., 204], and authorities there quoted.

And so, it is considered, the position that a submission falls by the marriage of a female submitter, will be found doubtful, when examined.

The decisions referred to by Mr. Fraser do not appear to be in conflict with the views now stated. In Tailfer's case (Jan. 21, 1735, 5657 and 17032), a married woman and her husband were parties to a submission respecting her heritage, in which they afterwards attempted, but unsuccessfully, to reduce the award. And the case of Maitland, May 18, 1796 (641), in so far as it touches on the present point, expressly bears that, as the husband, "on his marriage, obtained right to the sums claimed by the tutors under the submission, the proceedings of the arbiters subsequent to it were inept, from his not having been a party to them." This may plainly correspond, and, in fact, appears to correspond, entirely with the doctrine above maintained in the text, and merely to imply that, if notice had been given to the husband to appear for his interest, the subsequent procedure would have been regular,—a doctrine which seems to be equally consonant with expediency and sound principle. See this case more fully noted, *infra*, p. 107, note.

It must be admitted, however, that, by the law of England, a submission falls upon the marriage of a female submitter. But the law of England has diverged so widely from the law of Scotland, respecting arbitration (*inter alia*, respecting the revocability of pending submissions), that no safe inference can be drawn from that source, in such a question. In England, it is not only held that a woman's marriage voids the submission as to herself, and all others who may be "co-plaintiffs, or co-defendants in the reference;" but further, "as it is a voluntary act on her part, it is a breach of her agreement to abide by and perform the award, and renders her and her husband liable to an action."—Russ. 162, 163, [4th ed., 152].

[2] 3 Ersk. 3. 39; 1 Ersk. 7. 18; 1 Bankt. 7. 29; 2 Fraser 119, [Parent and Child, 2d ed., 244]; Maitland, May 18, 1796 (641), *infra*, p. 107, note.

lenging the contract of submission, within the *quadriennium utile*, after reaching majority, and asking restitution against it, if he can show that it was to his "evident lesion" that the contract was entered into. But his challenge will be ineffectual "where enormous prejudice is not proved."[1]

174. There is not, perhaps, enough of authority in the institutional writers, or the reported decisions, to enable a precise definition to be given of the limits within which the plea of minority and lesion will be successful in reducing an award. It is desirable, however, to indicate these as far as possible; and the following observations may contribute to that end. They apply, it should be observed, equally to the case of pupils and minors.

175. It would appear that the plea, in order to be valid, requires either to strike at the contract of submission itself, as a contract which has been injudiciously and unfitly entered into; or at the selection of an unsuitable arbiter; or at the defective manner in which the minor's case has been conducted under the submission. If it truly was a prudent and proper tutorial or curatorial act to enter into the submission; if a suitable arbiter was selected; and if the minor's interests were duly attended to, by stating the proper pleas on his behalf, in conducting his case before the arbiter,—then no plea on the head of minority and lesion would seem to arise, although the minor, on coming of age, should allege that the arbiter's award had resulted in iniquity, and had thereby caused great patrimonial loss to him.

Were it otherwise, the privilege which the law accords to minors would be stretched beyond its only legitimate limits, viz., the protection of the minor against the risks which are incident to immaturity of years and understanding.[2] That protection appears to be complete in the circumstances above stated, because it is then carried so far as to place him on the same level, in point of safety, which is occupied by prudent and discreet men of full age.

Any lesion which may be alleged, nevertheless, to have eventually arisen to the minor, from the iniquity of the arbiter in pronouncing an erroneous judgment, could not be said "to proceed either from the weakness of judgment or levity of disposition incident to youth, or from the imprudence or negligence of his curators."[3] It would therefore seem to be beyond the scope to which the law justly confines the special remedy of minority and lesion.

[1] 1 Ersk. 7. 18, and 34; 1 Bankt. 74, and 93. [2] 1 Ersk. 7. 36.

[3] 1 Ersk. 7. 36; see also 2 Fraser, 226, 227, [Parent and Child, 2d ed., 406]. "The lesion must arise out of the deed itself, which, at the time it was entered into, must be shown to have been prejudicial to the minor. The principle of the restitution is, that the minor, being presumed to be unable to judge for himself, and either having no curators with whom to advise, or having received improper advice, has been led into a transaction which his more mature judgment shows to have been prejudicial and injurious."—More's Notes, xlvi.

176. In a litigation in the public Courts to which the tutor is a party, if he duly performs what is incumbent on him, and states all proper pleas on behalf of the pupil, the pupil has received his full measure of protection, and *quoad ultra, utitur jure communi.* It would be to the prejudice of the lieges generally, to extend his privilege beyond that point. Accordingly, a decree of Court, pronounced in such circumstances, however erroneous it may be on the merits, will nevertheless form a good *res judicata* against the pupil, in those cases in which it would have formed *res judicata* against any party of full age.[1] And so, in like manner, any award pronounced under the circumstances above stated, should be unchallengeable by a pupil, except on such grounds as those on which it might be challenged by a party of full age.

177. Such, accordingly, appears, on the whole, to be the doctrine of Kilkerran, in reporting the case of Williamson.[2] It related to a submission by a minor, with consent of his curators; but the rule appears equally to apply to a submission by a tutor. Kilkerran states it was there "found, that a minor, who had submitted with consent of his curators, in a case which, of its nature, was pretty much involved in fact, *utebatur jure communi*, and could not be heard to quarrel the decree-arbitral upon iniquity; and in the reasoning, taken for granted, that he might, with their consent, have transacted.

"It might be very prejudicial to minors, if, in such cases especially as are proper subjects of transaction, yet they could not terminate them by submission or transaction; yet, if an enorm lesion should appear, it is not doubted but the minor would be reponed."[3]

178. In this case, several surviving partners of a joint-adventure, and the representatives of deceased partners, submitted to an arbiter the determination of their respective liabilities, in circumstances of some intricacy in point of fact; and an award was given, subjecting

[1] 1 Ersk. 7. 38. "Neither can the minor be restored against judicial proceedings, unless where some material defence has been omitted, or some irregularity has taken place. Nor can a minor be restored against a decree-arbitral."—More's Notes, xlvi. If it were intended, by these last words, to state that a minor, in challenging an award, has no plea to urge more favourable than is competent to a major, the doctrine would seem, with deference, to be too absolutely laid down. But probably it was not intended to put the doctrine otherwise than it has been above stated in the text.

[2] Dec. 12, 1739 (8965).

[3] Though the use of the words, "enorm lesion," in this last sentence, certainly requires special attention, yet it would rather appear (especially when the facts of the case are taken into view), that they are quite consistent with the doctrine, that the "lesion" which will suffice to set aside an award, in a reduction raised within the *quadriennium*, requires to embody one or other of the elements above stated, sec. 174, *et seq.*

a minor as representing three deceased partners. The minor, on coming of age, was found not entitled to challenge the award, although he made the pregnant allegation that he only represented two of the partners. The successful party pleaded that the minor, with consent of his curators, could undoubtedly "enter into a submission concerning any controversy, the same being a rational deed, in order to shun the expense of law processes; otherwise, minors would be in a worse case than majors, etc. And, therefore, there can be no lesion in entering into a submission concerning an inveigled affair, etc.: and as the submission is binding, so, by our law, a decree-arbitral cannot be reduced on the pretence of iniquity."[1]

179. With respect to the mere amount of lesion which is requisite to warrant the demand of restitution, "if it be inconsiderable, restitution is excluded; for actions of reduction are extraordinary remedies, not to be applied but on great and urgent occasions."[2] The lesion must therefore be considerable, or, as it is frequently described, "enorm lesion." On this subject, the case of Aikenhead[3] may be noticed; because, although it refers, not to a submission, but a transaction, the reports show that the power of a tutor to bind his pupil by submission is often treated as tantamount to his power to bind him by a transaction.[4] In that case, a minor, coming of age, challenged a transaction by his tutor; and the Court declared, "that if there was but *modica læsio*, they would not reverse or rescind the transaction; but only where enorm lesion appeared."

180. Erskine considers it uncertain whether a tutor can effectually submit a doubtful claim respecting the heritable estate of his pupil.[5] But as a tutor does not possess the power of either alienating, or burdening, or otherwise disposing of the heritage of the pupil, by any direct deed of his own,[6] it would seem, *a fortiori*, to be beyond his power to do this through the medium of a submission; because the entering into a contract of submission, respecting his pupil's heritage, involves the extraordinary power of delegating to a third party (the arbiter) to deal with that heritage according to his private opinion.[7]

[1] Home's Report of Williamson's case (665). See also the opinion of the Court in an analogous case, "that a factor *loco tutoris* might enter into a reference; although it was observed that, if the question was not the proper subject of such an agreement, or if an improper person had been chosen arbiter, the pupil might be restored *ex capite lesionis*."—Falconer, Feb. 17, 1792 (16380). See also 1 Bankt. 7. 93.

[2] 1 Ersk. 7. 36.

[3] Nov. 14, 1711 (16331).

[4] See also 1 Bankt. 23. 17.

[5] 1 Ersk. 7. 18.

[6] Finlayson, Dec. 22, 1810, F. C.; Vere, Feb. 29, 1804, F. C.

[7] It may be noticed that, in the case of Aytoun, Jan. 18, 1711 (14997), it was admitted in argument, by the party defending the award, that "tutors have no power to submit their pupils' clear liquid rights, where there is no *lis, nec metuitur*, or is heritable; for their submission, on such, is a *species alienationis*, unless the authority of a judge is interposed," etc. [See also Fraser, Parent and Child, 2d ed., pp. 244, 245.]

181. Where there are more tutors than one, it is necessary that the contract of submission be authorised by a quorum of their number. But where a quorum of tutors have duly authorised the submission, it would not appear that the death of one of the quorum who had signed the deed, should cause the submission to fall, provided that a quorum of tutors still remained alive; even though such surviving quorum had not all signed the deed. Because the quorum who signed, did so, not only for themselves, but as representing the whole body of the tutors in performing a tutorial act. They rendered the whole tutorial body a party to the contract of submission. If all the tutors together should sign a submission, it would clearly subsist, notwithstanding the deaths of any which did not reduce the number of survivors below a quorum. And as the signature by a quorum is equally effectual with the signature by the whole, it would appear that, so long as a tutorial quorum survives, the tutorial act will not become resolved through the death of any individual tutors.

182. If, however, by death or otherwise, the number of surviving tutors should be reduced below a quorum, it seems difficult to avoid the conclusion, that the submission itself would then fall, just as in the case of the death of an ordinary party-submitter, or the death of a sole tutor. The legal effect of the extinction of a quorum, seems, *quoad hoc*, the same as the legal extinction of the whole tutors.[1]

183. Where a tutor has entered into a submission for his pupil, if the pupil die pending the submission, the submission comes to an end. Though not a party in form, the pupil is nevertheless the radical party to the submission, through the medium of his representative, the tutor. The death of the pupil is, therefore, truly the death of the party; and, moreover, it necessarily brings the tutorial office to an end.[2] It has been questioned whether a submission, entered into by a tutor, falls by the expiration of the tutorial office, which is consequent upon the pupil's reaching puberty. Certainly the instances are numerous, in which a pupil, on reaching puberty, has been sisted with his curators, to a current submission which had been entered into by his tutors.[3] But where this occurs, and after-procedure on both sides follows, it might be held that all parties were bound by homologation and acquiescence, even although it had been originally competent to break up the submission on the expiry of the tutorial office. It might be unsafe, therefore, to rely on such cases as settling the question. At the same time, it would be very remarkable if the right of thus break-

[1] 2 Fraser 119, [Parent and Child, 2d ed., 245]. See opinions in Maitland, *infra*, sec. 184, note.

[2] In England, the death of an infant (a minor) is a revocation of the submission, *quoad* his trustees and guardians, who were the parties.—Russ. 168, [4th ed., 157].

[3] See, for instance, Ferguson, June 20, 1828, 6 S. 1006.

ing up a submission had existed, without its being frequently and notoriously acted upon.

184. The latest writer on this subject states, in his valuable work, that "a submission, entered into by a tutor, does not fall by the arrival of the pupil at puberty."[1] It would be a subject of

[1] 2 Fraser 119, [Parent and Child, 2d ed., 245]. The case to which Mr. Fraser refers as illustrating this rule, among others, is that of Maitland, May 18, 1796 (641). As this case involved various questions of great interest in arbitration law, was very fully discussed, and, though often quoted, leaves some doubt as to what points it expressly decides, a short note of it is here subjoined.

David Gavin of Langton died in 1779. He left a widow, Lady E. Maitland Gavin, and four pupil daughters. He had nominated Lady E. Gavin, Lord Lauderdale, and others, to be tutors and curators to his children; any two to be a quorum, and Lady E. Gavin a *sine qua non*. Alexander Deas, a tenant of part of the estates of Gavin, had claims under his lease for certain repairs executed by him. He withheld payment of a portion of his rents; and certain processes being in dependence between the tutors and him, a general submission of all pending disputes, including the processes, was entered into, in 1779, by Lady E. Gavin and Lord Lauderdale on the one part, "as tutors, and taking burden on them for their said pupils," and by Deas, with consent of Mitchell and Arnot as his cautioners, on the other part. It was provided that, whatever the arbiters should determine, the said Lady E. Gavin and L. Lauderdale, "as tutors, and taking burden on them as aforesaid, bind and oblige themselves and their said pupils, and their heirs and successors; and the said Alexander Deas, and the said Wm. Mitchell and Js. Arnot, as cautioners for him, on the other part, bind and oblige themselves, jointly and severally, their heirs and successors respectively, to implement," etc.

Mitchell and Arnot consented that, if any sum was found due by Deas "to the children of the said David Gavin, or either of them, or to their said tutors," the arbiters should "decern them (Mitchell and Arnot), their heirs and successors, jointly and severally with the said Alexander Deas, in payment thereof." Mitchell and Arnot, moreover, bound themselves, "as cautioners for and full debtors with" Deas, to make payment in all respects on the same terms "as the said Alexander Deas is or shall be awarded to pay."

The arbiters were two counsel, who became respectively Lord Eskgrove and Lord Dunsinnan pending the submission, which lasted fourteen years. An award was pronounced in 1793, before which time Lord Lauderdale was dead; the two eldest of the daughters of David Gavin had reached majority; and, moreover, they had been married. In point of fact, the rents which were in dispute belonged exclusively to them. In addition to these changes, Arnot was now also dead. The death of Lord Lauderdale had occurred during the minority of the daughters. No sisting of any new party had taken place during the submission, nor had any notice been sent to the husbands of the two married ladies, to appear for their interests.

The award narrated, *inter alia*, that the arbiters held it to be proper for them to proceed in determining the matters submitted, notwithstanding the death of Arnot, to whose representatives notice had been sent, to appear for their interest, which they declined to do. It found Deas liable for a balance of £891 to the representatives of David Gavin, and it ordained Deas and the surviving cautioner Mitchell, conjunctly and severally, "to pay the said sum to Lady E. Gavin for the said representatives;" it declared Arnot's heirs and representatives to be conjunctly and severally liable, along with Deas and Mitchell, etc.; and, on the other hand, it ordained Lady E. Gavin, for behoof of the representatives of David Gavin, to

much regret if the law were otherwise. The pupil, though not the nominal party, is nevertheless the true radical party to the submission from the outset. He acts, of necessity, through the medium of his tutor, as representing him, because he himself has no *persona*

execute a discharge in favour of Deas, of the rents, etc., due by him, and of the processes against him.

Mitchell died soon after, and an action was brought by Lady E. Gavin, with concurrence of her daughters, and of the husbands of such as were married, concluding for payment to be made to her, for behoof of Gavin's representatives, of the sums contained in the award. Defences were lodged by the representatives of Mitchell and Arnot. The chief points brought under discussion were :—

I. Whether, by the death of L. Lauderdale, the submission had fallen. The defenders contended : (1) that, by the conception of the submission, he was bound not merely *qua* tutor, but personally ; and if so, his death was as fatal to the submission as the death of any other proper party would confessedly be. But (2) that, even *qua* tutor, he was one of the quorum of two, who alone were sisted in the submission, and without both of whom the tutorial instance was gone. The pursuers answered : (1) that, by the conception of the submission, L. Lauderdale was not bound as a party, but as tutor only ; and (2) that after the contract of submission had once been duly entered into by a quorum of the tutors, acting on behalf of the pupils, it was not subsequently evacuated by the death of one of that particular quorum, so long as the other tutor continued to appear ; and a quorum of tutors, competent to authorise all tutorial actings, remained alive.

II. Whether the submission fell when the pupils reached majority,—the tutorial office then necessarily expiring, and the minors themselves being the proper parties who should have been sisted along with their curators.

III. Whether, at all events, the submission fell when the pupils reached majority, and those two who had the whole interest in the rents, etc., in dispute, were married ; seeing that the husbands had neither made appearance in the submission, nor received any notice to do so.

IV. Whether the death of Arnot, the cautioner, did not, in itself, terminate the submission ; especially as (the defenders contended) Arnot was made, by the conception of the submission, a direct party-submitter.

The Court pronounced a general interlocutor "sustaining the defences, and assoilzieing the defenders." From this, it does not appear which of the several formidable pleas of the defenders were sustained by the Court ; and the Faculty Report has not given the opinions of the Judges separately. It states generally :— "Lord Lauderdale (it was observed) bound himself personally, by taking burden for the pupils in the submission ; and being thus patrimonially interested, it fell by his death. Besides, as Lord Breadalbane (husband of Miss Gavin), on his marriage, obtained right to the sums claimed by the tutors under the submission, the proceedings of the arbiters, subsequent to it, were inept, from his not having been made a party to them."

The following notes of the opinions of the Judges are extant, as written on Baron Hume's Session papers for summer 1796, in the Advocates' Library :—

"Justice-Clerk Braxfield : If Miss Gavin was not major at the time of Lord Lauderdale's death, that will overturn the decree. If tutors submit, and the pupil become major pending the submission, the decree thereafter given will be good ; because the pupil comes into the place of the tutor-submitter, and attends to his interest. But here, by the death of L. Lauderdale, who was a necessary part of the quorum submitting, the submission came to an end. As Lady Betty (Lady E. Gavin), the only party to the submission, could not have submitted by herself, so

standi. And it would indeed seem anomalous, if, upon his acquiring a direct *persona standi*, he should not be entitled (if he wished), and bound (if required), to proceed with the submission. The mere superinduction of another name does not evacuate a submission, in the case of a sequestration, where the trustee of a bankrupt party comes, by the operation of the law, into the room of the party himself. And, *a fortiori*, the sisting of a minor and his curators (often including the ex-tutor), on the minor's emerging from pupillarity, would seem to be a proceeding equally well-founded in legal principle, and recommended by manifest expediency.

185. If a pupil reached puberty, and he and his curator declined to sist themselves, care should be taken to serve notice upon them to appear; otherwise, it would seem to be irregular to proceed with the submission, and any award would apparently be liable to reduction. The same rule would seem to apply here as in the case of a sequestration, where, if the trustee neither appears, nor receives notice to appear, the subsequent procedure is irregular, and the award is reducible at his instance.[1]

186. An award which is pronounced in a submission with a tutor, will not warrant summary diligence, but only an ordinary action against the pupil on his reaching puberty;[2] "in which action he would be decerned to implement and fulfil, unless he instructed evident lesion."

187. As a minor exercises, generally, all the powers over his

neither could the submission stand by and through her alone, after L. Lauderdale's death."

"President (Campbell): I doubt if the death of Arnot (cautioner) would evacuate the obligation. But I am clear that the submission fell by the change of circumstances as to Miss Gavin. Lord Lauderdale and Lady Betty (Gavin) submitted as burden-takers for Miss Gavin. His power and office was at an end by his death, and so the submission was at an end. Was also at an end by the marriage of the ladies, and their coming under the curators who should have been made parties, and are not bound otherwise."

"Justice-Clerk: Submission is a mandate which falls by the death of the mandant."

"Find the decree (arbitral) not binding."

From these opinions it would appear that the Court had held—(1) That where one of the parties-submitters is a quorum of tutors, the death of a tutor, if it reduces the survivors below a quorum, causes the fall of the submission; and (2) that the marriage of a female party, whose husband neither sists himself in the submission, nor receives notice to appear, lays the award open to reduction. But from the variety of pleas which were stated in defence, and the very general terms of the interlocutor of Court, it is perhaps difficult to say more than this; unless that an opinion was indicated that the death of a cautioner does not cause the fall of a submission.

[1] Barbour, Nov. 21, 1811, F. C. See also opinions in Maitland, *supra*, that the husband of a married woman must, as her curator, receive notice of the submission.

[2] Ayton, Jan. 18, 1711 (14997).

moveable estate which a person of full age can do (but with certain privileges allowed him by law for his protection), a minor, with concurrence of his curators, may enter into submissions respecting his moveable estate.[1] If he has curators, and acts without their concurrence, his act will be void and null.[2]

188. As a minor who has no curators can perform the same acts by himself alone, which a minor with curators can perform with their concurrence,[3] a minor without curators may competently enter into a submission respecting his moveable estate. But (upon grounds more fully noticed *supra*, sec. 173, *et seq.*), it would be imprudent in the extreme for any party to enter into a submission with a minor alone. In Court, the opponent of a minor is always entitled to insist on the appointment of a curator *ad litem*, for his own protection, if the minor have no curators. And it is even *pars judicis* to see that such an appointment is made, though neither party moves for it.[4] It would be so evidently imprudent to enter into a submission with a minor who has no curators, that probably it is practically unknown.

189. As a minor cannot directly make a gratuitous alienation of his heritage, *inter vivos*, nor even an alteration of the destination thereof (unless under the onerosity of a marriage-contract),[5] it must follow that he cannot effectually submit such matters to arbitration. That which he cannot himself do directly, he cannot empower an arbiter to ordain him to do by any award.

190. As a minor may onerously dispone, or may burden, or lease his heritage,[6] it would appear that he could competently submit questions arising out of, and ancillary to, such onerous alienation, burdening, or leasing, by him. As, for example, in selling an estate, he might agree to submit the determination of the price to arbiters mutually chosen; or in granting a lease, whether agricultural or mineral, he might agree to the insertion of one of the ordinary submission-clauses in the lease. But in every case of submission by a minor, whether he has no curators and acts alone, or has curators and acts with their concurrence, it is the general rule of law that he has the privilege, already noticed, of bringing a challenge of the award, on the head of minority and lesion, within the *quadriennium utile* after he attains majority.[7] To this general rule, however, there is an exception in the case of a trading minor, who is regarded as upon the same footing with persons of full age, in all questions arising out of his trading

[1] Williamson, Dec. 1739 (8965 and 665); 2 Fraser 204, [Parent and Child, 2d ed., 376]. See also Ferguson, June 20, 1828, 6 S. 1006.

[2] 1 Ersk. 7. 33. [3] 1 Ersk. 7. 33. [4] 1 Ersk. 7. 13.

[5] Muirhead, Nov. 17, 1724 (8955); M. of Clydesdale, Jan. 26, 1726 (1265); Cuninghame, Mar. 8, 1797 (8966).

[6] 1 Ersk. 7. 33; 2 Fraser 174, [Parent and Child, 2d ed., 335], and authorities there quoted.

[7] 1 Ersk. 7. 34; 2 Fraser 174, [Parent and Child, 2d ed., 335].

concerns.[1] It is competent for him to enter into a submission for having such questions determined by an arbiter; and apparently he would not possess any privilege of minority if he attempted to set aside the award.

191. No question can arise as to the continuance of a submission to which a minor and his curators are parties, after the expiry of the curatorial office by the minor's reaching majority. In a submission by a minor, with concurrence of his curators, the minor is not only himself a direct party, but the true party, with whom the curators merely concur as advisers during his lesser age. And when their office ceases, in consequence of the minor becoming *sui juris*, and no longer requiring their advice, the only change in the procedure under the submission will be, that no further appearance will be made for curators, who are no longer either requisite or competent. But the late minor, who has now become major, is both entitled to go on with the submission, if he desires it, and bound to do so if required, as much as any other party who was equally *sui juris*.

192. It has been held in England, that where a party has entered into a contract of submission with a minor, and was aware at the time, of the minority, such party is barred by personal exception from afterwards challenging the award upon the ground of the incapacity of the minor, from his weaker age, to enter into the contract.[2] As this doctrine is rested upon a broad principle of equity, it might be expected that it would receive effect in Scotland.[3]

193. A factor *loco tutoris* may enter into submissions respecting the moveable estate of the pupil.[4] But the award will be liable to challenge, on the head of minority and lesion, at the instance of the pupil, by his bringing a reduction at any time within the *quadriennium utile* after his reaching majority, as already explained in regard to a submission by a tutor.[5]

194. A judicial factor does not possess the power of entering into submissions as one of the usual powers belonging to his office.[6]

[1] 1 Ersk. 7. 38.

[2] Russ. 22 and 297, [4th ed., 18, 283].

[3] See *supra*, sec. 164, note 3. In Brown, June 17, 1758 (16359), when a party endeavoured to reduce an award, on the ground that a factor *loco tutoris* had no power to enter into a submission, one of the grounds on which the award was successfully defended, was, that the party knew all along that he was making a submission with a factor *loco tutoris*, and was personally barred from taking this ground of challenge.

[4] Falconer, Feb. 17, 1792 (16380). See also Brown, June 17, 1758 (16359); Baillie, May 19, 1829, 7 S. 619.

[5] See Falconer, *supra*, sec. 178, note 1.

[6] Macdowal, July 8, 1778 (4058). In an action of declarator, valuation, and ranking, which was pursued by an heir, served *cum beneficio*, against his father's creditors, a judicial factor was appointed, who entered into a submission of certain claims affecting the estate. An award was pronounced, which was brought under

195. It seems doubtful whether executors, whose powers flow solely from their office, and who hold no further authority derived from any settlement, possess the power of entering into effectual submissions for determining thereby either the validity of claims made against the estate of the deceased, or of claims made in favour of it. An executor "is a judicial trustee." "He has only a power of ingathering the executry goods, but he has not the distribution of them, and therefore ought to make no payment without the warrant of the judge from whom he derives his authority."[1] At least, if he does make payment to any alleged creditor, who does not instruct his debt by decree, he does so *suo periculo;* the *periculum* being, "that they are true debts which he pays."[2] In the event, therefore, of there being a shortcoming of funds, any unpaid creditor of the deceased might object to the executor's taking credit for a payment made by him, pursuant to an award under a submission between him (the executor) and the party in whose favour the award was pronounced. The unpaid creditor seems entitled to say that he was not bound by the award, as he was no party to the submission; and that, unless the executor could prove, *aliunde*, that the sum contained in the award was a debt justly due by the deceased, he must still account for the sum which he had paid away without warrant. And so, in like manner, where the estate was solvent, any of the next of kin, or beneficiaries, whose patrimonial interests were affected by a payment which the executor had made under an award, seem entitled to object that they were not bound by that award, and to require the executor either to prove *aliunde* that the debt which he had paid was justly due, or to account for the sum as still unpaid.

196. With respect, again, to claims made against alleged debtors of the deceased, if the executor, when ingathering the estate, should submit any of these claims to arbitration, and an award should be given against him, it would seem to be open to any creditor, or to any beneficiary, whose patrimonial interests were thereby affected, to maintain, in like manner, that he was not bound by a submission to which he was no party; and consequently, on its being proved to the Court that the claim which the arbiter had disallowed was nevertheless a valid claim against a solvent debtor, the executor would be bound to make good the amount to the estate of the deceased.

reduction by a succeeding factor and the creditors, who alleged that it was *ultra vires* of the deceased factor to enter into submissions. The Court reduced the award, and "were of opinion that, under the usual powers of a judicial factor on a subject, that of referring claims is not included; and it was said by several of the Judges, that the Court could not grant such a power on the application and consent of only part of the creditors; that even though there were an application from the whole creditors, it was not the province of the Court to grant such a power."

[1] 3 Ersk. 9. 43.

[2] Gardner, Nov. 28, 1810, F. C.

197. The *curator bonis* of a lunatic has power to enter into submissions, in questions affecting the moveable estate of the lunatic.[1]

198. In a recent case, under very special circumstances, a consignee, holding goods with a power of sale which he had exercised, was held entitled to enter into a reference with the purchaser, as to the marketable condition of the goods. The consignee had accepted bills to an amount very nearly equal to the whole value of the goods consigned. The consignor became bankrupt during the currency of these bills. The consignee was obliged to carry through prompt sales for his own relief. The purchaser in one of the sales, objected that the goods which he had got were not marketable, and threatened an action of damages against the consignee, which the latter could only avoid by agreeing to a reference. The reference was entered into, *bona fide*, before well-selected referees; and it was afterwards viewed by the Court as the most eligible proceeding which could have been adopted for the benefit of the bankrupt estate itself. On the award being given, the purchaser deducted the amount of the damages out of the price which he had agreed to pay for the goods. In these very special circumstances, the Court found the cautioners of the consignee entitled, in accounting with the bankrupt estate, to deduct from the balance to be paid by them, the expense of the submission, and also the foresaid sum of damages. L. Mackenzie observed, "In the special circumstances of this case, I concur with your Lordships. But I should hesitate long, before I laid down any such rule, as that a consignee, with a power of sale, has a power to enter into a reference as to the marketable condition of the goods consigned; especially where the consignor is in the same country, and can be advised with. But this case is peculiar, and does not involve any such general principle as that."[2]

199. A mercantile company may become a party to a contract of submission, whether regarding moveable or heritable estate, and will be as effectually bound thereby as any individual party. The submissions are numerous and important, in which mercantile companies are parties. But no single partner can, without special authority, bind his co-partners by signing the submission with the company firm, or otherwise; such an act not being one of ordinary administration, or impliedly within the general institorial power of a partner.[3] It is not necessary, however, that the assent by the company to the submission should be instructed by any formal writing. It may be proved by facts and circumstances, if sufficient to establish that the company homologated what the subscribing partner had done.

[1] Corson, July 10, 1835, 13 S. 1093. "The powers of curators to idiots and furious persons," as to the estate of the party, "are precisely the same as those of tutors to pupils."—1 Ersk. 7. 52.

[2] Douglas, May 27, 1836, 14 S. 843.

[3] Lumsden, Nov. 1728 (14567).

200. Where the company effectually repudiate a submission which one of their partners had signed, purporting to bind the company, it would appear that such partner will himself be liable personally to make good to the opposite party whatever is awarded against the company.[1]

201. The trustee in a sequestration, with concurrence of the commissioners, may enter into submissions as representing the bankrupt estate, when they consider it advisable to do so; and the award following on such submission will effectually bind the creditors and the bankrupt.[2]

202. If the party to a submission shall become bankrupt and be sequestrated during its dependence, his trustee, with the concurrence of the commissioners, may make appearance and be sisted as a party in the submission, and insist on its being prosecuted to a conclusion, in the same way that the bankrupt could previously have done. On the other hand, the opposite party may cause notice to be served on the trustee, calling on him to sist himself in the submission; and, in the event of his failing to do so, may require the arbiter to proceed with the submission, notwithstanding the absence of the trustee. Nor will an award, thereafter pronounced, be liable to challenge by the trustee, on the ground of his not having been a party to the proceedings.[3] But if no notice be given to the trustee, the award will be reducible, being pronounced *parte inaudita*.[4]

203. Official liquidators, appointed by the Court, under the Joint Stock Companies Act, 19 and 20 Vict. c. 47 [now repealed, see note], are

[1] This principle appears to be involved in the decision by which a law-agent, who had agreed to a submission purporting to bind his client, was found personally liable when the award was afterwards successfully repudiated by the client.—Livingstone, Feb. 23, 1830, 8 S. 594.

The law of England appears to be the same, Russ. 23, 24, [4th ed., 18], and also the law of Rome. Voet observes that if one partner enters into a submission, it is not valid to the effect of binding his co-partners against their will; "sed potius ad effectum illum, ut socius compromittens pœnam adversario solus exsolvat, si socius alter sententiæ arbitri nollet parere; eâ enim ratione unumquemque posse promittere factum alienum, ut, si ille non fecerit, promissor pœnam præstet, receptum est."—Ad Pand., L. 4, t. 8, sec. 4.

[2] The clause in the Consolidating Bankrupt Act, 19 and 20 Vict. c. 79, sec. 85, provides in the most general terms, that "the commissioners shall superintend the proceedings of the trustee, concur with him in submissions and transactions, give their advice and assistance relative to the management of the estate," etc.

Though the previous Bankrupt Acts were repealed by sec. 2 of the consolidating statute, it may be well to observe the very full and comprehensive power which was given by 2 and 3 Vict. c. 41, sec. 98, in lieu of which (*inter alia*) the existing provision came. It declared that "the trustee may, with consent of the commissioners, compound and transact, or refer to arbitration, any question which may arise in the course of the sequestration, regarding the estate, or any demand or claim made thereon; and the compromise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt." See also the old Bankrupt Act, 54 Geo. III. c. 137, sec. 55.

[3] Grant, June 23, 1820, F. C. See also Anderson, May 25, 1821, 1 S. 31.

[4] Barbour, Nov. 21, 1811, F. C.

empowered by sec. 90, "with the sanction of the Court, to refer disputes to arbitration, and to compromise any debts or claims." Liquidators, appointed under a voluntary winding-up of the company, "shall have all powers hereinbefore vested in official liquidators, and may exercise the same without the intervention of the Court."[1] Sec. 104 (7).

204. Whether trustees, under a private trust-deed, have power to enter into submissions affecting the trust-estate, must depend on the terms of the particular deed under which they act.[2]

205. Generally speaking, an heir of entail, entering into a submission, cannot effectually bind a succeeding heir of entail to abide by the arbiter's award, as to any liability which he could not have imposed on such heir by his own direct deed. He cannot, in short, through the instrumentality of a submission, enlarge in any degree his own powers *qua* heir of entail.

206. But as an heir of entail is the true fiar and *dominus* of the estate, though subject to great limitations in his powers of administration, there have sometimes been important interests adjusted by a submission, to which he was a party, which have been found validly to affect succeeding heirs of entail. For example, a portion of an estate which was strictly entailed, consisted of 330 acres of muirland, over which an adjoining burgh possessed a servitude of feal, divot, heather, etc. In 1770, the heir of entail and the burgh entered into a submission, under which the arbiter divided the muir, allotting 46 acres to the burgh, and the rest to the heir of entail, free of the servitude. After each party had had exclusive possession, in terms of the award, for upwards of 40 years, and the whole land had been reclaimed and rendered fertile, the burgh brought an action to have the heir of entail decerned to grant a feu-charter of the 46 acres, which the award had ordained to be done; failing which, the Court were craved to adjudge these lands to the burgh, in implement of the award. The heir of

[1] See also 20 and 21 Vict. c. 14, sec. 17; 20 and 21 Vict. c. 78, sec. 3, *et seq.* [These Acts are repealed by 25 and 26 Vict. c. 89 (Companies Act, 1862), which does not expressly confer power on liquidators to enter into submissions. But it may sometimes be necessary, and is still competent, for them to do so. See first and last paragraphs of sec. 95; sec. 133, § 7; secs. 160, 162, 171. The last-named section confers on liquidators all the powers of a trustee on a bankrupt estate, as to which see note 2, p. 114.]

[2] It is observed by Russell, p. 576, [4th ed., 575], in regard to the law of England, that, "by submitting to a reference, without guarding against being personally responsible, executors, and trustees, and assignees of bankrupts and insolvents, are taken impliedly to admit that they have sufficient funds or assets to answer the award;" therefore "held liable to an attachment, if the arbitrator ordered them to pay, and will not be allowed to allege, in excuse for non-performance, that they have no assets." [See also Mackintosh *v.* Mackintosh, Nov. 10, 1863, 2 Macph. 48; Thomson's Trs. *v.* Muir, Dec. 13, 1867, 6 Macph. 145. By the Trusts Act, 30 and 31 Vict. c. 98, sec. 2, § 5, trustees are now empowered "to compromise or to submit and refer all claims connected with the trust estate."]

entail, for his own safety, lodged defences, pleading that it was *ultra vires* of the heir then in possession to enter into the submission; and that if he (defender) granted the charter now, it would involve an alienation of part of the estate, and a contravention of the entail. But the Court unanimously held, that the granting of the charter, as ordained by the award, would not, in the circumstances, be an act of contravention.[1]

207. The voluntary assignee of one of the parties to a submission has been held entitled to make appearance in the submission, and at its close to crave that the forthcoming award in favour of his cedent should be pronounced in his, the assignee's, name.[2] In this case the assignation conveyed the whole sum claimed by the cedent, all as set forth in his claim in the submission; "with power to the assignee to obtain decrees-arbitral, interim or final, in his own name." The assignation was intimated to the opposite party at an early stage of the procedure, and subsequently, when the pleadings, which had been conducted throughout in the name of the cedent only, were drawing towards a close, the assignation was produced in the submission, and the assignee craved that the arbiters should issue their award in his favour. The opposite party thereafter lodged a representation against notes which the arbiters issued, and he therein objected, *inter alia*, to the competency of the assignee being made a direct party compearing in the submission. The arbiters refused the representation, and, on the narrative that a certain sum was due to the cedent, and that the above assignation had been produced in process, they decerned in favour of the assignee.

[1] Mag. of Dysart, Nov. 27, 1832, 11 S. 94. L. Balgray: "I think the granting of the feu-charter is an act of alienation; but, looking to all the circumstances, I do not think it an act of contravention of the entail. An heir of entail is *dominus* of the estate, though his powers are fettered in various particulars by the terms of the deed under which he makes up his title. He cannot waste the estate by acts of alienation, but still he possesses some discretionary powers, though limited. This agreement between the heir of entail and the burgh was most clearly beneficial for both parties, but particularly for the entailed estate. In place of that estate containing 330 acres, all affected with a grievous servitude of feal and divot, heather, clay, and fuel, such as to render the property of little value and very unsusceptible of improvement, the result of the agreement is, that 46 acres of this unprofitable soil are given up, and about 280 acres are turned into profitable and improving land. I cannot construe this to be an act of alienation prohibited by the entail, and I think the Court should decern against the defender for a feu-charter."

L. Pres. Hope.—"I concur. An heir of entail may execute various acts of administration. In particular, he may pursue a process of division of commonty; and he is *dominus* of the estate, and, as such, entitled to have claims of this nature settled under a submission. He is not obliged to be at the expense of a legal process for this, merely because he is an heir of entail."

L. Craigie and Gillies concurred.

See question raised as to power of heir of entail to become a party to a submission, in Caledonian Ry. Co., Feb. 25, 1857, 19 D. 527; *infra*, sec. 224, note 3.

[2] Henry, Jan. 29, 1835, 13 S. 361.

208. It will be observed that, although the assignation was intimated at an early stage of the submission, the assignee did not make appearance in the submission till near its close, and did not in any way interfere in the pleadings, which were conducted throughout in the name of the cedent. It was, moreover, observed by the L. President, that the cedent remained effectually bound as a party to the submission, after he had executed the assignation, just as he was before. The case, therefore, as actually decided, elicited from L. Mackenzie the observation, that he could not perceive the possibility of injustice to the opposite party, "in allowing decree to go out in the assignee's name in place of the cedent. It is a mere formal objection that is taken to the validity of the decree, and I think it is unfounded."[1]

[1] The opinions of the Court touch on general principles in arbitration law; and L. Moncreiff, Ordinary, in reporting the cause on cases, intimated that he thought it might raise a question of great difficulty, if an assignee insisted on making appearance at an earlier stage of the submission, and to the effect of interfering in the conduct of the proceedings. It is difficult to abridge the opinions of the Judges, which are therefore quoted at length. L. Moncreiff, in his note, observed :—"The principal question which arises in this case appears to the L. Ordinary to be in a great measure new, and of considerable importance. The question is, whether, where a submission has been entered into between two parties for the decision of all questions, claims, and disputes, at that time existing between them, it is competent for one of the parties, by a special assignation, to convey his contingent claim under the submission to a third party, to the effect of enabling that third party to make appearance, and become directly the party in the arbitration; and whether it is competent for the arbiters to give decree to that assignee, *nominatim*, notwithstanding an objection by the other party to the competency of the proceeding. The L. Ordinary has difficulty in thinking that such a decree is competent; for a submission being merely a contract, and the motives and good faith on which it may be entered into very often depending on the knowledge of the character of the person who is the other party to it, it seems to be difficult to say that either of the parties can, by his voluntary act, change the nature of it, so as to compel his opponent to proceed in such a transaction with a third party, with whom he never agreed to enter into any arbitration. I may be willing to enter into an arbitration with a friend or neighbour, for the settlement of accounts between us, or even to submit a disputed matter with a person whom, though I have differed with him, I know to be a man of honour and fairness, rather than go into a Court of law; and yet, if I had expected to have for my opponent perhaps the most notorious and troublesome litigant in the Courts of the country, I would not have entered into any such contract. With a view, therefore, to the *bona fides* of arbitration, it seems to be an important question, whether such a change in an essential point of the transaction can be forced upon a man against his will."

"Cases of bankruptcy have occurred. But, although such cases are not free from doubt, in principle they do not touch the present case; for in such cases there is no voluntary assignation of the particular claim in the arbitration. The immediate interest in it merely passes, by the act of the law, with the other estate of the bankrupt, and the bankrupt himself continues to have a direct interest. The trustee is merely sisted to enable him to go on. But if it be essential, in order to make a submission binding with the heir of the party, that this should be expressly provided, it is difficult to see how, without any such clause, it should be made to pass in the much stronger case of an assignee."

At advising in the Inner House; L. Pres. Hope: "If the effect of an assignation

209. The mandatary or the agent of any party, if specially authorised, may enter into a contract of submission, on behalf of his constituent, by which the constituent will be as firmly bound as if he had himself been the direct party. But in such a case, the mandatary or agent must carefully employ such obligatory words as bind the constituent only, where such is the intention. If he does not attend to this, he may be himself personally bound, as well as his constituent; or he may even be alone directly bound to the other party-submitter, leaving himself to seek recourse and relief from his own constituent.[1]

was to liberate the cedent from the contract of submission, and to substitute the assignee alone in his place, the question would be very different from that which is presented for our decision. But as the cedent remains effectually bound, notwithstanding the assignation, I cannot see any ground for holding him disabled from executing the assignation, or the assignee from obtaining decree in his own name."

L. Balgray.—"I think the assignation is competent. There are many similar cases in which parties agree to submit questions, and where it is evident that there is a power to assign and to make the assignee a party to such submission. In a sale by public roup, for instance, it is often inserted in the articles of roup that disputes shall be settled by reference to a party therein named. But if a man purchase a lot at such roup, and afterwards, by private bargain, sells his lot, *cum omni causa*, to a third party, certainly his disponee not only acquires the right of enforcing the article relative to submission to the arbiter, if a dispute arises; but he also comes under the obligation to be a party to such submission, if called on. I think a judicial assignee of this claim could have appeared in the submission and enforced the claim; and I can see no good ground for holding that the voluntary assignee could not do so."

L. Gillies.—"I think the decree-arbitral is good and valid. I have often heard of a *delectus personæ* in the choice of a co-partner or of a tenant; but I do not understand such *delectus* to exist in the choice of an antagonist."

L. Mackenzie.—"I think the reasons of reduction ill-founded. It is past all question, that the party to a submission can assign his whole claim and interest to a third party, pending the submission. The only question is, whether the assignee can be introduced into the submission, as a direct party to it. This is quite established in the case of a trustee on the sequestrated estate of either of the parties; and I am at a loss to see why the same right should not belong to a voluntary assignee. I can conceive that the admission of a trustee might, in some cases, be more prejudicial to the opposite party than the admission of a voluntary assignee; but I cannot see any ground for holding the converse of this. Indeed, it does not occur to me that there is even the possibility of injustice in allowing decree to go out in the assignee's name, in place of the cedent's. It is a mere formal objection that is taken to the validity of the decree, and I think it is unfounded."

[1] Gardner of Glasgow had pecuniary claims on Robertson, who carried on business at Dunfermline, but resided in London. Gardner entered into a submission of these claims, with Cuthbertson, residing in Dunfermline, who stated himself in the deed of submission "as acting and taking burden on himself for" Robertson. The submission showed, *ex facie*, that the claim of Gardner arose entirely out of his transactions with Robertson. The submission declared, that whatever the arbiter shall determine, "the said Thomas Gardner and Robert Cuthbertson, as taking burden on him for the said R. H. Robertson, hereby bind and oblige themselves, their heirs, executors, and successors, to abide by, implement, and fulfil to each other, under the penalty of £100 sterling, to be paid by the party failing to the party observing," etc. The arbiter found a balance of

210. With respect to mandates, "conceived in general terms, for the management of the mandant's affairs," it will be observed, that "a general mandate gives no power to transact or refer to arbiters any debateable right, arising between the mandant and a third party." If the mandant "wants to devolve that power on the mandatary, he may do it by a special commission."[1] If, therefore, the mandant should disclaim a submission to which he had been made a party by a mandatary, acting under such a general mandate, the mandatary himself would be personally liable for the breach of his own obligation; which was, that his constituent should be firmly bound by the submission.[2]

211. An advocate has an implied power to submit to arbitration a process, in the conduct of which he is professionally employed. Instances are common, in which counsel on both sides agree to the submission of a cause, sometimes in the form of a judicial reference, sometimes in that of an ordinary arbitration. This may take place at any time during the dependence of a process, and has repeatedly occurred after a cause was before the jury. The clients are thus respectively and conclusively made parties to the contract of arbitration. But although the implied power of counsel would enable him to adopt this proceeding without special authority from his client, it is believed that in most cases in which it is practicable to communicate with clients, their express instructions are obtained; as it is only reasonable that they should be advised with before taking a step which so gravely affects their interests.[3]

212. With respect to the very rare case of an advocate submitting a cause, notwithstanding instructions from his client to the contrary, and the questions of personal responsibility which may be raised thereon, reference may be made to the recent case of Swinfen, in

£350 due to Gardner, and gave an award against "the party-submitter, Robert Cuthbertson," for said sum. Action was raised to enforce this award against Cuthbertson, who pleaded that he was not liable personally; as the submission, *in gremio*, showed that Robertson was the only debtor of Gardner, and that he, Cuthbertson, merely acted as an agent binding his principal. The Court, however, repelled the defence, holding that Cuthbertson had not used words proper for binding his constituent, apart from himself; but, on the contrary, had used words proper for binding himself personally and directly.—Woodside, Feb. 4, 1848, 10 D. 604. See also law of England as to this subject, Russ. 27, [4th ed., 22].

[1] 3 Ersk. 3. 39.

[2] See secs. 200 and 213. It would seem to be a general principle, that when a party, bearing a representative character only, purports to bind his constituent in a contract,—if the constituent shall prove to be ineffectually bound, for want of power in the representative, the latter incurs the personal liability which attaches to the breach of his own contract and undertaking, which was, that his constituent should be effectually bound.

[3] Gilfillan, Mar. 8, 1833, 11 S. 548. "I apprehend that there can be no doubt that counsel, by the law of Scotland, have that power."—Per L. Campbell, in Mackenzie, Mar. 9, 1843, 2 Bell's App. 53.

England, where the privileges belonging to the honorary office of counsel, and his power to make a certain compromise, under such alleged circumstances, were fully discussed.[1]

213. A law-agent has no implied power to submit to arbitration a process, in the conduct of which he is professionally employed. If he does so without express authority, and if his client eventually repudiates the submission, he will himself be found personally liable to implement the award pronounced in favour of the opposite party,[2] or in damages for its non-implement.

214. Without special authority, a servant or overseer has no power to bind his master as a party to a submission.[3]

215. A corporation may become a party to a submission, affecting the rights or interests of the corporation, when the proceeding is sanctioned by a corporate act or minute authorising it. But this can only be done so far as a corporation possesses full powers of control and disposal over any subject or interest so submitted.[4]

CHAPTER II.

WHAT SUBJECTS MAY COMPETENTLY BE SUBMITTED TO ARBITRATION.

216. EVERY right or interest, heritable or moveable, and in general every matter, may be made the subject of arbitration, respecting which two or more parties have a dispute, and over which they possess a sufficient power of disposal. But, as the whole power of the arbiter is derived from the parties themselves, he cannot by his

[1] Swinfen, June 8, 1860, 29 Law Journal (Ex.) 382.

[2] Livingstone, Feb. 23, 1830, 8 S. 594. "It is very true that the obligation was undertaken by Johnson, in his capacity of agent, and he accordingly would have been free from any responsibility for his client's solvency; but he undertakes that she is to be bound by the decree."—Per L. Glenlee, *ibid.*

The law of England is different in this respect: Russ. 28, [4th ed., 23]. "It has been often decided in England, that parties are bound by a reference signed by their counsel or by their attorneys."—Per L. Campbell, in Mackenzie, Mar. 9, 1843, 2 Bell's App. 53. It will be kept in view, that, until lately, an English submission was revocable by either party, in a manner quite unknown in Scotland.—Russ. 154, [4th ed., 144]. It therefore involved much less assumption of power by an agent, to enter into an English submission.

[3] Baird, Dec. 16, 1831, 10 S. 147.

[4] This is merely the general rule applicable to all parties to a submission. See case of a submission with a burgh, under special circumstances.—Mag. of Dysart, Nov. 27, 1832, 11 S. 94. [As to arbitrations under the Companies Act, 1862 (25 and 26 Vict. c. 89), see secs. 72, 73, 162.]

In England, it would appear that "corporations aggregate may be parties to a reference." But the "reference must be an act of the corporate body."—Russ. 25, [4th ed., 20].

award go further in dealing with any subject submitted to him than the parties themselves (if they agreed together) could do by their joint deed.[1]

217. Thus, for example, if A. makes a claim of debt against B., who denies either its amount or its validity, or who alleges a counter-claim against A., this is one of a large class of cases which are very commonly made the subject of arbitration, and in which an award may be pronounced of the most binding efficacy. Because A. and B. themselves, if they could only agree with each other, could directly and effectually dispose of these claims and counter-claims by their joint deed; and therefore they can competently grant full power to a private individual, as their arbiter, to terminate their difference by his decision; they binding themselves to abide by, and to implement it.

218. But if it happened that the claim of A. rested on a document which B. alleged to be forged, and the parties agreed to submit to the arbiter the question whether it was forged or not, the element of the public interest (which is concerned in every criminal charge) would then be involved; and it would immediately appear how far the private parties could enable their arbiter to pronounce an effectual award. They could do so to the effect of disposing of their own patrimonial interests only; and they could not, by any form of words or obligation, enable him to make an award which would affect the public interest. Accordingly, if the arbiter, under such a submission, should pronounce an award declaring that the document was genuine, and that it instructed a debt against B.; this award, however effectual against B. as to his private individual interests, would in no degree prevent the public prosecutor from insisting in a charge of forgery against A., if he saw cause to do so, in the criminal court, and obtaining conviction and punishment, upon adducing proof of the crime, in the ordinary course.

219. Because the private parties could not dispose of the public

[1] "Whatever can be transacted may be determined by arbitrament; submission and a decree-arbitral thereon being in effect a transaction by intervention of the arbiters."—1 Bankt. 23. 17. [There is no rule to the effect that questions of fraud do not fall under a general clause of arbitration. E. of Kintore *v.* Union Bank, Nov. 20, 1861, 24 D. 59; affd. March 12, 1863, 1 Macph., H. L., 11, 4 Macq. 465.]

See MacCally, June 15, 1821, 1 S. 70, where a husband submitted a question as to the fee of his wife's heritage. She was not a party to the submission, and was held not bound by the award; seeing that the fee of her heritage did not fall within her husband's power of control and disposal, but remained with herself. The same test of the parties' power of control and disposal determines, in all other cases, what may competently be submitted by them. So, accordingly, where four joint-tenants raised an action of damages, and three of them agreed with the defender to a submission of the action, which was followed out to an award, this was not found to dispose of the whole action, so as to bar the fourth pursuer from afterwards wakening the action, as he had been no party to the submission.—Mackintosh, Jan. 23, 1834, 12 S. 321.

interest by any deed of theirs; and they therefore could not effectually submit to arbitration, whether a crime had or had not been committed. It belongs only to the public law of the country, as delivered through the constituted Courts, possessing competent criminal jurisdiction, to deal with such a question as this. The public safety requires that no private parties should, by any form of proceeding whatever, possess the power of infringing on that jurisdiction.[1]

220. In like manner, in any other case where the public interest is concerned, it is beyond the power of private parties, by any form of obligation or agreement, to submit the matter effectually to arbitration. For example, if two parties have a dispute concerning their social status—as, whether or not they are married persons—they cannot effectually bind themselves to abide by the award of an arbiter, purporting to determine on the validity or invalidity of their marriage. If, *de facto*, they, in the eye of the law, as administered by the public Courts, are married persons, they cannot, by any direct deed of theirs, declare off, and undo the marriage. Neither can they do this through the medium of submitting the question to an arbiter, and binding themselves to abide by his award. For any question as to the subsistence of a marriage affects the public interest, and the very frame and constitution of society itself. It belongs to the public police as the commonwealth, to declare by what rules marriage shall be contracted and dissolved. And it concerns the public, that the state of marriage shall be determined by these rules, and by none other. The only recognised organs for the application of these rules are the public Courts of the country. All private procedure or agreement, whether it takes the form of a submission or any other form, is so absolutely ineffectual to abrogate the law in this respect, that an award, finding a marriage null—however formal such an award might be, and however unimpeachable on the Regulations 1695—would not even possess force enough to raise a personal objection against either party who should proceed, immediately thereafter, to bring a declarator of marriage into Court.

[1] It would appear that, at an early period of the history of the law, when the boundaries were less clearly defined between the interests of private individuals and of the public, awards were occasionally supported, which, apparently, implied the exercise of a species of criminal jurisdiction by the arbiter towards the parties. Thus Spottiswoode reports that "Mr. John and Mr. Magnus Arthurs pursued the Geddies and the Wallets in St. Andrews, and their cautioners, for the contravention of a decreet-arbitral, by which they were decerned to be banished the country for certain years, or during the will of the pursuers, and not to resort within a mile of St. Andrews, under the pain of lib. Alleged, that the decreet was null, in so far as it prescribed a pain of banishment, which no private man could do by law, *cum, de jure, non sit concedendum quod per magistratus fieri potest.* Nevertheless, the Lords repelled the exception, in respect they thought it a part of the assythment made to the party in 1590, and that it was *quasi voluntarium exilium.*"—Spottiswoode, Practicks, *voce* Arbiter, p. 14.

221. For similar reasons, the question of a man's legitimacy cannot be effectually made the subject of arbitration; nor the question whether he was an alien or a British subject; nor, in general, any question of social status.

222. So, in like manner, if two individuals had a dispute with each other concerning the right to a title of honour—such as a peerage, for instance—and even on the supposition that one of the two had undoubtedly the right to the title, they could not validly submit their dispute to the award of an arbiter. They could not, by their direct and joint deed, transfer the right to the title from the party, in whose blood alone it was inherent, under the royal letters-patent, to another party, on whom the Crown had not bestowed it. And neither could they attain the same end by submitting their dispute to an arbiter, and binding themselves to abide by his decision. It is utterly beyond the power of private individuals thus to trench on the royal prerogative, the privileges of the peerage, and the interest of the State.[1]

223. Further, and in respect to a different class of cases, also involving the public interest, it is inept and unavailing to enter into a submission for determining on the validity of any claim which is *contra bonos mores*. Accordingly, if a person should claim a sum as due, either by written agreement or otherwise, as the price of prostitution, which claim was resisted by the seducer; and if the parties submitted to an arbiter to determine the question of liability, binding themselves, as usual, to abide by his award; all this would be of no avail whatever to render an award for such a sum effectual in law. Because no individuals possess the power of effectually obliging themselves to do what is *contra bonos mores;* and, therefore, an obligation to abide by an award would necessarily be inept, if the award purported to constitute an obligation which was *contra bonos mores.*[2]

224. So, again, if an interest affecting an entailed estate were made the subject of a submission with an heir in possession, and if no special statute had conferred enabling powers in that behalf, no award which might be pronounced, however absolute in its terms, could affect any greater interest in the entailed estate than the heir in possession had under his own disposal and control.[3] This would

[1] See also Ramsay, Nov. 19, 1624 (16245), which related to a right of tutory to a pupil "which the Lords found it was not lawful to submit."

[2] In England, and probably in every civilised country, the law is the same. "Where the subject-matter is clearly illegal, no binding award can be made."—Russ. 5, [4th ed., 5]. Steers, Nov. 17, 1794, 6 T. R. 61.

[3] In a question regarding the validity of an award under a submission between an heir of entail and a Railway Company, a point was raised, whether the submission was a statutory or a common-law submission, and it was (*inter alia*) pleaded by the Company, that, under a common law submission, it was *ultra vires* of an heir of entail to enter into a submission for determining the price of land taken, or compensation due for permanent injury to the entailed estate. The Court held that, in the

be the result, however unchallengeable the award might be, under the Regulations 1695. For these Regulations were never meant, and have never been allowed, to fortify an award which it was *ultra vires* of the arbiter to pronounce; and every award must perforce be of that character if it disposes of interests which it was *ultra vires* of the parties to submit.[1]

process before them, the record did not admit of that plea being raised; but the following observations were made incidentally by L. Deas regarding it. "Now, it humbly appears to me, that to suppose Sir Norman (the heir of entail) to have entered into a common-law submission for fixing the price of land taken, and compensation for permanent injury to the entailed estate, would be to suppose him to have done what he had no power to do,—a supposition not readily to be adopted."—Caledonian Railway Co., Feb. 25, 1857, 19 D. 529. [Lands' Clauses Act, 8 and 9 Vict. c. 19, secs. 9, 35; March 7, 8, 23, 1860, 3 M'Q. 808.—See also Mackenzie *v.* Inverness and Aberdeen Junction Rail. Co., June 9, 1866, 4 Macph. 810.]

[1] It may be noticed here, that there are some instances recorded in the history of the country, in which matters of public concernment were made the subject of adjustment by arbitration. But these have been few, and they were anomalous and exceptional in their character.

There is, for example, the remarkable procedure, in the seventeenth century, by which patrimonial rights in teinds and church lands were made the subject of a series of submissions to King Charles I., as arbiter, though these rights affected the interests of the Crown, the nobles, the clergy, the burghs, etc. See a short notice of this, *supra*, p. 11.

Another anomalous species of submission, belonging to this class, is stated in Gosford's Reports; the case of the Magistrates of Edinburgh, Feb. 12, 1675, 1 Suppt. 732. After the occurrence of one of those great fires which were then not rare in Edinburgh, where many of the houses were still built of wood and covered with thatch, it was regarded as an important object of public policy, that all the new tenements to be erected on the site of the conflagration "should be of stone-work," and should be otherwise constructed with a due regard to the safety of the city against fire, as well as to its improved appearance. With this view, an amicable arrangement seems to have been made, in the form of a "submission by the whole neighbours of Edinburgh," to the Magistrates and Council, to which the Privy Council interponed an act of ratification, and under which powers were given to the arbiters to regulate as to the rebuilding of the new tenements. An attempt being made by one of the citizens to evade his obligations under the contract of submission, on the allegation of "enorme lesion or injustice," it was repelled by a decision, the report of which has handed down some notice of the transaction.

See also another instance of an unusual resort to the amicable remedy of a submission in the decreet-arbitral pronounced on 24th Mar. 1699 by the then L. President of the Court of Session, Sir Hew Dalrymple, adjusting the respective interests of the Commissaries of Edinburgh, and their clerks and procurator-fiscal, in certain official emoluments of the Edinburgh Commissary Court.—Third Report of the Commissioners on the Courts of Justice in Scotland, p. 61; printed by order of House of Commons, Feb. 11, 1818.

It is scarcely necessary to observe that these remarkable and exceptional cases of submission merely possess historical interest, and do not afford professional instruction or precedent of any kind. But still they serve to indicate how far arbitration-procedure has, at different times, suggested itself, for the disposal of cases where there were important and conflicting questions at issue, requiring an effective and equitable solution, but which happened to be ill adapted, either in their own nature, or from surrounding circumstances, to the forms and incidents of a court of law.

225. It is competent to submit depending lawsuits to arbitration, when the interests involved in the actions are such as could have been made the subject of submission, supposing that no action had ever been brought. The parties may either follow the course of agreeing to a judicial reference,[1] at the sight of the Court; or they may withdraw the action wholly from the cognisance of the Court, and confide the questions in issue to the judgment of a private arbiter, as in an ordinary submission. It often happens that parties thus resort to arbitration at the suggestion of the Court itself, when it appears, from the actual circumstances, that a case is better adapted for the forum of an arbiter than for a public tribunal.[2]

226. Parties may competently agree to submit future differences, if such shall arise (*ex. gr.*, in the course of executing a certain contract, etc.), though none may have already come into existence at the date of the agreement.[3] There are various questions connected with such an agreement, which are considered *supra*, p. 70.

227. Without multiplying further instances, it will be found, in all cases in which a question is raised as to what may be competently made the subject of a submission, that the answer will be obtained by considering whether the parties concerned had power, by their joint deed (if they agreed together), to deal directly with the subject submitted, to the same extent to which they intend to authorise their arbiter to deal with it in his award. If the parties had such power, the submission may be competently made, and the award will be effectual; if otherwise, not.

[1] See *infra*, Book V.

[2] In England, as already noticed, *supra*, p. 9, the Courts are invested with considerable powers of compelling parties to resort to arbitration in certain classes of actions. The same policy has been observed in various other countries, *supra*, p. 6.

[3] It may here be noticed, that a majority of the creditors in a sequestration, on one occasion, passed a resolution directing the trustee to submit to arbitration all disputes which might arise affecting the bankrupt estate. The minority of the creditors complained to the Court; and contended that each disputed question, as it emerged, should be considered by itself,—some cases being fitter for a Court of law, and some for arbitration; and that it was *ultra vires* for a majority, prospectively, to prohibit resort to a Court of law as to all future disputes, *per aversionem*. The Court recalled the resolution.—Cook, June 20, 1829, 7 S. 778.

BOOK III.

ARBITERS AND OVERSMEN; THEIR RESPECTIVE POWERS AND DUTIES IN THE CONDUCT OF A SUBMISSION.

CHAP.
I. Who may be Arbiters or Oversmen.
II. Implied Powers of Arbiters.
III. Powers and Duties of Arbiter in leading proof.
IV. Powers and Duties of Arbiter in hearing parties.
V. Powers and Duties of Arbiter in regulating process under a Submission.
VI. Power of Prorogation of the Submission.
VII. Power of Devolution of the Submission.
VIII. Power of Arbiter in regard to the renunciation of his office.
IX. Power of Arbiter to alter his award while undelivered.
X. Duty of Arbiter to exhaust the Submission.
XI. Power of Arbiter to remit to men of skill.
XII. Power of Arbiter over the expenses of process.
XIII. Power of Arbiter in dealing with penalties.
XIV. Powers and Duties of Oversmen.

CHAPTER I.

WHO MAY BE ARBITERS OR OVERSMEN.

228. An arbiter is a person voluntarily selected by any parties to perform the office of a private judge towards them; by determining some subsisting or contemplated dispute or question, which they submit to him, in order that it may be finally decided by his sentence or award.

229. Almost any person whatever, whom the parties choose to select as fit to be their arbiter, is entitled to act as such, in virtue of their selection; there being few personal disqualifications of an arbiter which it is not competent for the parties to waive.[1]

[1] With respect to the ancient law of Scotland, Balfour (Pract., p. 412) states generally: "All persounis that ar not forbidden be the law, may be arbiteris; Sic as all fremen, not beand under the hand or power of ane uther; And it is requirit that he quha sall be arbiter, be of gude brute and fame." In enumerating those who may not be arbiters, he specifies "bondmen or slavis;" women; persons "wod or furious;" or "allutterlie deaf or dumb;" and minors. The first of these five classes

230. An unmarried woman may be an arbiter. She is *sui juris*, and can exercise all acts of administration of her property or affairs, as effectually as a man can do. There is nothing in the nature of an arbiter's office which should make it radically incompetent for any person of the female sex; although, in most cases, a submission to a woman would seem to be a very ineligible procedure. But if any persons who have a dispute, choose to select a woman for their arbiter, either out of regard to her personal qualities, or to the subject-matter in issue, or to any other consideration, it appears to be entirely their own affair to bind themselves to abide by her award.[1] Whatever may have been the rule in those more barbarous times, when women were regarded as generally disqualified by their sex, from even being witnesses in Courts of justice, it is not now the law that unmarried women cannot be arbiters.[2]

231. The abstract question, whether a married woman could be competently selected as an arbiter,—provided that her husband consented to her accepting the office, and to her acting therein as freely and independently as if she were still unmarried,—is a matter of more curiosity than practical use. It is, perhaps, better to refrain from speculating upon a point which is of so little actual importance, and which has not been the subject of any decision. The same general observation may suffice to dispose of the competency of submissions to "the wod or furious." To the "allutterlie deaf and dumb," if they possessed the means of communicating by signs or by writing, there would not seem to be any radical incompetency in making a submission; but it is a question of no practical interest.

232. It has been decided that a minor may competently act as an arbiter.[3] The case is an old one, and the decision passed only by

of persons no longer exists in Scotland. The present state of the law as to the others is noticed in the text.

In the Roman law, "Arbitri esse possunt omnes non prohibiti, etiam sacerdotes; nec non Judæi; infames quoque, et libertinæ conditionis homines; cum nulla huic officio dignitas insit. Non tamen impuberes. Nec mulieribus, ob sexus verecundiam, arbitria recipere jus civile permisit." Voet adds that the last rule "nunc non servatur."—Voet. ad Pand., L. 4, t. 8, secs. 6, 7.

See also Hein. ad Pand., L. 4, t. 8, sec. 533.

"Sunt autem arbitri, hoc loco, judices compromissarii, vel cives Romani, ex compromisso, litigantibus dati, quibus a prætore fuit data potestas, arbitrio suo, ut jus et æquum habebatur, hereditatem, consortium cuique suam distribuendi: ut omnis controversia omnesque partium lites auferantur."—Funcc. Leg. XII., Tab. Ed., 1744, p. 245.

[1] It seems to have been otherwise in the ancient law of Scotland. "Fæminæ non possunt judicare in arbitrio."—Reg. Maj. Scotiæ, Lib. II. cap. 1, sec. 1. See also, on this subject, caps. 3, 4, and 5; also Balf. Pract., p. 412.

[2] 1 Bankt. 23. 14.

[3] Gordon, June 1582 (8915). It does not appear from the report how near the minor was to majority.

In England they hold it very largely in the power of the parties to waive per-

the casting vote of the Lord President. But provided that the parties know of the minority at the time when they select their arbiter, it appears to be within their power to waive all objection on that account. *Volenti non fit injuria.* It seems practically impossible that any rational men shall ever submit a question to the arbitration of a youth, so far within the years of majority as to be plainly quite incapable of apprehending and performing his duty. Short of that point, it would seem to be within the power of the parties to bind themselves to abide by his award, if they chose to undertake such an obligation. Beyond that point, if ever such a case shall arise, it will then be time to observe whether the Court will class such a proceeding with a *sponsio ludicra,*—a mere agreement to play at pitch and toss for settling a question,—an agreement which the Courts of Scotland decline to consider or enforce; or whether the view should be followed which seems to prevail in England, of holding parties bound by the award even of such an arbiter.[1]

233. The same rules as to this matter would appear to apply equally to the case of a sole arbiter, and that of a plurality of arbiters. But in that class of submissions in which parties can effectually bind themselves to submit to arbiters who are not named at the time of entering into the agreement—as in a submission-clause ancillary to the extrication of valuations at the expiry of a lease, for instance—if it should eventually happen that, when arbiters required to be mutually named, one of the parties should name a minor, or a woman, or a

sonal objections if they please. Russell states that there are authorities to the contrary, but nevertheless "the better opinion is," that even "idiots, lunatics, infants (minors), married women, persons attainted or excommunicated, may be arbitrators; for every man is at liberty to choose whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those whom he has himself selected."—Pp. 107, 108, [4th ed., 102].

It is true that Mr. More, in his learned notes on Stair, p. xlii, has this passage: "It has been held that a minor may be an arbiter, and a notary-public, and a messenger-at-arms; but it may be doubted how far minors can lawfully be appointed to such public offices." In so far as this remark applies to the case of a notary-public or a messenger-at-arms, it would appear to be clearly well founded. Both of these parties are proper public officers, who, before they can act as such, receive an authoritative sanction of their fitness to perform the important duties belonging to their respective offices. The adequate performance of these duties requires maturity of judgment, which again requires, of any given class of men, that they shall be beyond minority. And as the public are bound to recur to those officers for the performance of duties which are competent only to them, there appears to be conclusive ground for saying that minors cannot be lawfully appointed to the office. But the position of an arbiter, who is no public officer, but a private judge, deriving his whole authority from the contract of parties, appears to be the converse of all this; and therefore it is submitted that the observation in question should not be extended to arbiters.

[1] It is worthy of observation that, while the period of majority at Rome was twenty-five years of age, minors who had reached twenty years might be chosen arbiters.—Hein. ad Pand., L. 4, t. 8, sec. 533.

near relation of his own, or any other person than a man of full age and free of palpable objection, it would seem that the other party might justly object to such a nomination, and insist that his opponent should act *bona fide* in the matter, and appoint another arbiter. In the ordinary style of an agreement to submit "to two men mutually chosen," —and assuming that each party has a right to select an arbiter whom the other party cannot reject at his mere pleasure or caprice,—still the fair meaning of the agreement would appear to be, that each party shall only be allowed to please himself in selecting his own arbiter, provided that the person selected shall belong to no exceptional class.

234. An arbiter should stand absolutely indifferent between the parties-submitters. His office is essentially of a judicial character, and requires complete impartiality as one of its inherent attributes. Wherever, therefore, an arbiter is affected by any circumstance having a plain practical tendency to bias him in favour of one of the parties, and so to destroy his impartiality, his acting as arbiter will be open to challenge, of a character more or less grave, according to circumstances. For example, if he has a patrimonial stake in the subject of dispute, coincident with the interest of one of the parties, and consequently opposed to the interest of the other; and if that stake be sufficient to create a bias in the mind of any ordinary man, it would seem to be open to the party who was liable to be hurt by the existence of the bias to object to the actings of the arbiter at any stage of his procedure, provided that he took the objection as soon as he discovered the grounds for it. It was the duty of the opposite party to have disclosed the existence of the partial interest affecting the arbiter, if he was aware of its existence. And even if both parties were alike ignorant, it was incumbent on the arbiter himself to have expressly discovered it to the parties, and to have declined to accept an office the duties of which were incompatible with the existence of any interested bias in his mind.[1]

235. The objection of bias has occasionally presented itself under very special circumstances; as, for example, when the parties, at entering into the contract of submission, saw and acknowledged the existence of strong elements of bias as affecting the arbiter's position, which they deliberately waived; and when, in the course of the submission, the arbiter came to be exposed to new elements of bias of an important character. In these circumstances, it would appear that the Court regarded the case as one of specialty; and where the submission was ancillary to another and primary contract, in which the selection of the particular arbiter in question must evidently have been regarded

[1] [Thus it is also incompetent for an arbiter to act as such after he has been examined as a witness for one of the parties.—Dickson *v.* Grant, Feb. 17, 1870, 8 Macph. 566.]

as very important, the Court have not felt warranted in holding the arbiter disqualified by the incidence of the new elements of bias, in cases where it might be presumed they would have held him disqualified by those same elements of bias, if he had originally been selected by the parties as one who was understood to be free from all biassing position whatever.[1]

236. Even if the arbiter should have proceeded the length of pronouncing an award which was, *ex facie*, regular and formal, before the existence of the biassing interest came to be discovered, it would seem that a reduction of the award might be successfully brought, provided that the interest was not so very small as to render it plainly improbable that an ordinary man would be affected by its influence. The contract into which the parties entered, to submit their dispute to an arbiter, and to bind themselves to abide by his award, would seem otherwise to have been entered into, by one at least of the parties, under essential error.

237. In the case supposed, the arbiter must have committed a breach of duty, whether in concealing from both or from either of the parties the existence of the bias by which he was liable to be affected. And perhaps this fact, coupled with the existence of the biassing interest, might let in a challenge on the head of "corruption," as used in the Regulations 1695. It would seem necessarily to involve a miscarriage, in point of duty, quite distinct from mere error of judgment. But, independently of this, and on the principle of the law of contract itself, as already considered, the award would seem to be challengeable at common law. The parties, in binding themselves to submit to the decision of the arbiter, had in their minds, as qualifying their obligation, the necessarily implied condition, that the arbiter was free from

[1] Phipps, Mar. 11, 1843, 5 D. 1025. In a contract for forming part of a railway, all disputes between the Company and the contractor were referred to A. B., the Company's engineer; it being stipulated that neither his holding that employment, nor his being a shareholder in the Company, should disqualify him from acting as arbiter. He accepted the office, and had made some orders under the submission, when he was appointed manager of the Company. The contractor afterwards raised an action against the Company, to which it was pleaded, as a preliminary defence, that the subject-matter of the action fell under the subsisting reference to A. B. The pursuer answered that A. B.'s supervening appointment as manager disqualified him from acting as arbiter. The Court held that, while the submission subsisted, it must bar the action; that it could only be taken away by reduction; and that the additional element in A. B.'s position, of his being appointed manager, did not warrant them in holding him disqualified, seeing how largely the parties had, by express stipulation, waived the objection of personal bias. The Court, accordingly, dismissed the action. [See also Mackenzie *v.* Inverness and Ross Rail., Dec. 21, 24 D. 251; Trowsdale *v.* N. British Rail., July 12, 1864, 2 Macph. 1334; Trowsdale *v.* Jopp, Nov. 15, 1865, 4 Macph. 31; Dickson *v.* Grant, Feb. 17, 1870, 8 Macph. 566. In the first three cases, various strong elements of bias were held not to disqualify the arbiter; in the last case an architect was held disqualified from acting as an arbiter under a building contract after having been examined as a witness for one of the parties.]

bias either way. And as soon as the actual fact of his biassing interest was discovered, it would appear that the parties would no longer remain obliged to submit to his award. If they had bound themselves respectively to buy and sell an article, as its weight should be ascertained by a certain pair of scales, which were assumed to be just, they would not remain bound by the weight (so ascertained), after it came to be discovered that one arm of the balance was longer than the other, or that the scales were otherwise materially affected by inherent inequality. So, in like manner, the obligation to abide by the award of an arbiter, assumed to be indifferent and impartial, would appear to be open to reduction, as soon as it should be discovered that the essential quality of impartiality had been supplanted by an unfair bias in the arbiter's mind.[1]

238. But, in order to enable a party to take an effectual objection to the arbiter on the ground of his partial interest, it is necessary that the objection shall be timefully stated. In particular, if the party already knows of the objection at the period when the arbiter is selected, he will be held to have waived his declinator by assenting to the selection, and he will not be allowed afterwards to recur[2] to it. And although the existence of the objection should only be discovered by him at a later stage, he must still take his stand upon it without delay, as soon as he makes the discovery. He will not be suffered to hoard it up, until he shall have ascertained what kind of award shall be pronounced, and then bring it forward in the event of his being disappointed by the terms of the award.

239. This last observation applies in the case of every personal dis-

[1] See, in connection with this subject, Mitchell, Jan. 14, 1715 (663); which, however, seems to have savoured much of actual bribery.

[2] Johnston, July 8, 1817, 5 Dow 247. See also Russ. 108, [4th ed., 102], as to the law of England, which appears to be the same. It is quite competent for parties to waive such objections, if they please. The question, therefore, whether a party in any given case has knowingly waived them, is just a question of evidence; and as soon as such waiver is proved, either by the party's own actings or otherwise, it raises a case of personal exception which bars all after objection by the party. Upon an analogous subject, it was lately observed by L. Ardmillan, Ordinary, in the note to his interlocutor in the case of Orrell, Feb. 22, 1859, 21 D. 556: "That nothing could be more opposed to legal principle, or to substantial justice, than to sanction tentative procedure by a party to a submission, under such circumstances as the present, and to sustain an objection to the submission, founded on the death of Wightman, taken by the pursuer; notwithstanding that he, the party objecting, has endeavoured to obtain an award in his favour, by proceeding in the submission, not only after the death of Wightman, but after the executor of Wightman had become a party to the submission, with the pursuer's knowledge and concurrence." "Had the award been in his favour, he would have taken the benefit of the submission, and would have stated no objection. He cannot be permitted to repudiate it, now that the award is against him." Though the *species facti*, which, in that case, gave rise to the personal exception, was different from that which is above considered, the principle of the exception is the same.

qualification of an arbiter (whether founded on patrimonial interest or not) which it is in the power of a party to waive. The same principle of justice requires that, if the party considers the arbiter to be disqualified by the objection, he must state the objection without undue delay; otherwise he will be held to have passed from it, and will not be permitted afterwards to recur to it upon his discovering that the views of the arbiter are less favourable to him than he had hoped to find them.[1]

240. The amount of patrimonial interest, or of other disturbing element of partiality, which shall create a personal disqualification in an arbiter, does not appear to admit of any precise definition. It must, apparently, be such as would have a palpable tendency to create a bias in the mind of an ordinary man. In one case, an attempt was made to interdict an arbiter from carrying on a submission, by alleging that he, as trustee under a private deed, was the creditor of one of the parties, and consequently had an interest to decide in favour of that party, who would thereby be the better able to pay what he owed to the trust. L. Cranworth held the objection to be futile, and observed: "That is a sort of interest, if you call it an interest, with which it is quite impossible for your Lordships to deal. If parties choose to appoint an arbitrator, without making inquiry into those minute circumstances, they must abide by the result." L. Brougham concurred.[2]

[1] See several alleged grounds of personal disqualification of an arbiter, founded on his examining witnesses "behind the backs of both parties," and otherwise, which a party was held to have waived by not taking the objection timefully.—Drew, March 8, 1855, 2 Macq. 10, 11.

[2] Drew, Mar. 8, 1855, 2 Macq. 7. See also Mackessock, Nov. 14, 1822, 2 S. 11.

In the Session papers of the case of Brysson, June 10, 1823, 2 S. 340, will be found averments on the subject of an arbiter's bias, which the Court held fit to be investigated in the reduction of an award, the pursuer alleging that the facts had only become recently known to him. He averred that one of the arbiters was largely in debt to the other, and had been concussed by his co-arbiter and creditor into a concurrence in an award dictated by the latter. He also averred that the other party in the submission was largely indebted to the same arbiter, who accordingly had an interest to decern in favour of his own debtor, so as to enable him to pay his debt. The result of the investigation does not appear.

The extent of interest or bias which will disqualify an arbiter was discussed in the English case of Elliot, Jan. 31, 1848, 2 De Gex and Smale, 17. In an arbitration under the Lands Clauses Act, to value land, taken by the South Devon Railway Company, the Company named as their arbiter a land-surveyor in their own employment; to whom an objection was taken, which, however, the party was held, by his own conduct, to have waived. The award was eventually pronounced by an umpire. Thereafter it was discovered that the umpire was a surveyor in the employment of the Great Western Railway Company, in which he also was a shareholder, and that this Company held many shares in the South Devon Railway Company. It was, therefore, objected that the umpire was biassed, being identified in patrimonial interest with the South Devon Railway Company.

V. C. Knight Bruce doubted "whether this person ought to have been appointed

241. It is stated by Bankton,[1] in general terms, that "relation, or other ground of declinator against judges, does not hinder persons from being arbiters;" adding subsequently, in the same paragraph, and apparently applicable to this case, that "the consent of the party-submitter excludes all objections."

242. There can be no doubt that a party who knew of the relationship between the arbiter and his opponent, and who nevertheless agreed to the submission, would be barred from afterwards taking that ground of objection. Moreover, it required statutory aid[2] to found a declinator on the ground of relationship to a public judge. But it would seem to raise a question of more nicety, if the existence of the objection was not discovered until after the submission was already in full progress, or even after an award had been pronounced. Perhaps the fact of an arbiter's near relationship to one of the parties could only be taken as an element (more or less material according to circumstances) in determining whether he was affected with corrupt partiality. Certainly it would be an important feature in such a question, that the existence of the biassing influence must, from its nature, have been known to both the arbiter and the related party, and must, by both, have been kept concealed from the non-related party, contrary to the plain duty which both of them owed to him. But, in the absence of decisions, it would be unprofitable to enlarge further on the subject.

243. It seems never to have been decided in Scotland, that the mere fact of an arbiter's being debtor or creditor to one of the parties was a disqualification for his acting as arbiter; although, if the debt be of considerable amount, it may well be a circumstance which should induce all concerned to refrain from selecting an arbiter so situated. There are cases in which this ground of objection has been expressly taken and repelled, but in them it rested on a very narrow basis.[3] As

umpire, in point of delicacy, considering that he was not only surveyor to the Great Western Company, which was intimately connected with the South Devon Company, but that he held shares in the former. I should, however, be going too far, to set aside the award on this ground. There are some things in this case which it would have been better had they been otherwise; but I think there are no judicial grounds on which to set aside the award. It is saved very narrowly, in my judgment."

It will be observed, however, when referring to English decisions as affording instructive illustrations of some general principle in arbitration law, that great caution must be used in applying them; because, "ever since the Act of King William (9 and 10 Will. III. c. 15), and the Act of Sederunt (Act of Regulations 1695), which has the force of a statute in Scotland, which is in the same reign and about the same time, the laws of the two countries may be said to have diverged." —Per L. Brougham, in Mackenzie, Mar. 9, 1843, 2 Bell's App. 50.

[1] 1. 23. 14. [2] 1594, c. 216; 1681, c. 13.

[3] See *supra*, sec. 240, note. In England it has been decided that an award cannot be set aside on the ground of the arbiter having been largely indebted to one of the parties, and of this fact not having been known to the other party. The Court

the weight due to it must depend on its practical tendency to affect the arbiter's mind with bias, its importance in each case will vary according to circumstances. Perhaps it may be regarded as probable, that, unless the circumstances were of a very special character indeed, such an objection, taken *per se*, would not be fatal, either to the continuance in office of an arbiter who had accepted and begun to act, or to the validity of an award already pronounced. It certainly could not be so, if both parties were aware of the fact at the date of selecting the arbiter: and apparently it might be inferred from the case of Phipps,[1] that if the parties were aware of the existence of considerable debts at entering into the submission, then a mere addition to their amount, pending the submission, would not in itself be readily allowed to create a disqualification. But in a case where an arbiter had mixed up with his award the payment of a debt due to himself by one of the parties, and the settlement of a balance due by himself to the other party, the Court, though they thought that "nothing unfair was intended," nevertheless reduced the award as *ultra vires*, and censured the arbiter's conduct. In this instance, the tenor of the award itself was affected by the importing of the arbiter's accounts into the *res gesta*; a smaller sum being awarded against one of the parties, and in favour of the other, than the actual balance as it stood on their mutual accounting, *inter se*, which was alone submitted. This result was produced by interweaving in the award the adjustment of the arbiter's own accounts with the parties, *hinc inde*. This was not only *ultra vires*, as the submission, of course, did not embrace the arbiter's own personal accounts; but it placed the arbiter and the parties in the highly objectionable position that the arbiter was adjusting with one party how much he (the arbiter) was to pay—with the other, how much he (the arbiter) was to receive,—at the moment while it still remained within the arbiter's breast how much was to be awarded by him in the mutual accounting between the parties themselves, as due by one to the other.[2]

observed: "No case has gone the length of saying that an award can be set aside because the arbitrator was indebted to one of the parties. It is certainly a matter of suspicion, but it is not of itself sufficient."—Morgan, 1832, 1 Dowl. 611. See also Russ. 108, [4th ed., 102].

[1] *Supra*, sec. 235, note.

[2] John and Thomas Elliot submitted their mutual claims of accounting to three arbiters, of whom Whitehaugh was one. Whitehaugh was creditor of John for £12, and was debtor to Thomas in a larger sum. The arbiters held Thomas to be indebted to John in £74. But, before giving their decree, Whitehaugh gave John a receipt as for £12, paid to him (the arbiter); took £12 off his own debt to Thomas, and gave Thomas a bill for the balance; after which an award was made against Thomas as owing £62 to John. This sum was the foresaid £74, under deduction of the foresaid £12. Nothing of this appeared *ex facie* of the award, which was a simple decerniture for £62. But the matter was recorded in the minutes of the submission. A reduction was brought, in respect that the *res gesta*

244. Even where a party has been named arbiter under a clause in a contract, and when disputes afterwards arise which fall within the submission-clause, yet if the arbiter in the meantime has mixed himself up with the matter in dispute, or with one-sided interests which palpably tend to create a bias in his mind, and to identify him with one of the parties, so as presumably to affect his impartiality in judging between the parties, the Court will hold him disqualified from accepting the submission, and acting as arbiter.[1]

245. Although the employment of a person as counsel or agent in a cause may have a tendency to create a bias in favour of the client's interest, it is not only competent, but it is matter of ordinary occurrence in practice, that the litigants in the cause select their respective counsel, or sometimes their respective agents, as their arbiters for deciding the questions raised in their pending action. Nor is it uncommon, that one of the counsel or agents is selected by both litigants as their sole arbiter. Any risk of bias which may exist in such circumstances, in the arbiter's mind, is of course well known, and patent to the parties in making their selection. They could not, therefore, fall back upon it afterwards.

246. An advocate who has accepted a submission, when at the bar,

involved a disposal by the arbiters of other accounts than those which were alone submitted to them; and because Whitehaugh had, in effect, decerned for payment of £12 to himself, as a debt due by John to him. The Court thought "nothing unfair was intended," but that it was nevertheless necessary to check anything that tended to create any bias in the delicate situation of arbiters. Their Lordships found "that it was not only *ultra vires compromissi*, but a very improper conduct in one of the arbiters to settle accounts betwixt him and the two parties-submitters; this settlement having been executed before the decree-arbitral was signed, by one of the parties taking a receipt from the arbiter, and the other party a bill."—Elliot, Dec. 15, 1789 (668). See analogous doctrine in law of England; Russ. 111, [4th ed., 106].

[1] Mackenzie, Dec. 19, 1828, 7 S. 215. Though this was special in the circumstances which gave rise to the bias in the particular instance, as all such cases are likely to be, it appears to involve the doctrine above stated. The objection of personal disqualification was stated against one of two arbiters, who had been named in a submission-clause in a contract of copartnery, and who were called on to act under the submission-clause. L. J. C. Boyle observed: "Next to that of a Judge, the situation of an arbiter is the most delicate. There must be nothing to bias him in one way or other. I am decidedly of opinion that this man has so mixed himself up with the matter in dispute, as to disqualify him from acting as arbiter. I do not say that he has done so with evil intention," etc.

The other Judges concurred—L. Alloway observing: "The situation of an arbiter appears to me to be even more delicate than that of a Judge, as what he does cannot be corrected; and if he mixes himself up with the matter, however innocently, we must hold him disqualified. As, therefore, I think there is something here that may give a bias, I concur in holding that he cannot be allowed to act."

The Court accordingly found that he "cannot act as arbiter in this case."

See also Tennent, etc., June 16, 1836, 14 S. 976; Reid, Dec. 15, 1826, 5 S. 130. [Dickson *v.* Grant, Feb. 17, 1870, 8 Macph. 566.]

is not legally disqualified from continuing to act by his being raised to the bench. On the contrary, it may be a duty, fairly owing by him to the parties, to continue to act as their arbiter, until he pronounces an award.[1] On the other hand, it may often be the most eligible course, on every account, that he should decline to act further in the submission. An arbiter can renounce his office on assigning a reasonable cause for doing so. If, therefore, in the case supposed, the arbiter, on considering the circumstances of the pending submission on the one hand, and, on the other, the paramount claim which his public office had upon his time, should feel that it was his duty to give up the submission, it does not seem to be doubtful that he would have power to do so, even although both the parties to the submission should concur in opposing it.

247. A supreme Judge may accept a submission, and act as arbiter. In cases of importance and delicacy, the supreme Judges, in former times, have often so acted in Scotland. "There is no law against it."[2] But opinions have lately been expressed on the bench,[3] that it is generally desirable that Judges should not become arbiters; and that they should confine themselves exclusively to the performance of their public judicial duties.[4]

248. It is competent for one party to submit a matter in dispute to the opposite party, as sole arbiter. He may effectually bind himself to abide by the award of the opposite party, if he chooses to do so.[5]

[1] Fisher, July 16, 1844, 6 D. 1286. See sec. 184, note.

[2] Fisher, *ibid.* 1 Bankt. 23. 14. [3] Fisher, *ibid.*

[4] By the Roman law, a *Judex Ordinarius* could not act as arbiter in any case to which he was competent as the public Judge. But this was altered by the Canon Law.—Hein. ad Pand., L. 4, t. 8, sec. 534.

[5] A party agreed to sell an heritable subject to the Earl of Montrose, and "referred the price" to the Earl's own determination. Being dissatisfied with the price, as fixed by the Earl, he refused to execute a disposition of the subject, alleging that no man could legally be arbiter in his own cause. "This allegeance was repelled, and the price determined by the buyer, upon this reference made to him by the seller, was allowed as good, and found not disagreeable to the laws and practice of this kingdom."—E. of Montrose, Mar. 13, 1639 (14155).

It is said by Bankton (1. 23. 14), that in such a case the award is reducible, on the head of iniquity, as the Regulations 1695 do not apply. He cites, for this doctrine, the case of L. Ross, July 22, 1673 (2283). It is thought, however, that this case scarcely supports the proposition. It occurred before the Act of Regulations was passed. And, moreover, there seems to be room for contending, that by the conception of the reference in question, the arbiter was bound to award something—whereas he proposed to award nothing—to his superior, who had referred to him what he should pay for obtaining an entry. It would rather appear, that after a party has deliberately made a reference to his opponent, and become bound to abide by his opponent's award, such award, if honestly pronounced, should not be challengeable on the head of "iniquity," which may mean mere error of judgment. On the contrary, as the opposite party had deliberately placed the arbiter in a position where he was most likely to be affected by unconscious bias, and where such party had no reason to look with confidence for more than an

He could voluntarily surrender the whole subject in dispute to his opponent if he pleased: and, *a fortiori*, is it competent to him to bind himself to accept only so much thereof as shall be awarded to him by his opponent.

249. Where an arbiter has become personally disqualified from himself acting as arbiter, he will not be allowed to exercise the important function of concurring with his co-arbiter in the nomination of an oversman.[1] It would be altogether inconsistent to hold that an arbiter was not disqualified for exercising so delicate and momentous an official act as that of nominating an oversman, on whom the whole submission was to devolve, at the same time that he was disqualified from himself acting in the submission.

250. The preceding observations, applicable to the case of arbiters, apply equally to the case of oversmen. An oversman is a person selected, either by the parties-submitters, or by the arbiters, if duly empowered to do so, for the purpose of deciding the questions which are submitted, in the event of the arbiters disagreeing in opinion with each other, and devolving the submission on him.[2] He is practically a sole arbiter. The same personal disqualifications attach to him which attach to arbiters, and it is unnecessary to repeat them. But it may be observed, that while it is open to the parties themselves, when they name their oversman, to waive personal disqualifications if they please, no such power will belong to arbiters, unless it be bestowed in express terms. The parties possess absolute powers in dealing with such a question; the arbiters possess trust-powers only. Therefore, when a mere general power is given to arbiters to name an oversman, in case of their own difference in opinion, it is implied that they shall select him from no confessedly exceptional class, such as minors, females, near relations of either party, or the like. Any such nomination would, accordingly, appear to be reducible by either party, as having been made by the arbiters in violation of their trust-duty, and therefore in excess of their power.

honest judgment, it would seem that no good ground exists why the party should not be bound to fulfil his own obligation, and to abide by the award, provided only that it was honestly pronounced, according to the arbiter's own conscientious opinion. In the law of Rome, when stating the recognised power of one party to submit his cause to his opponent, the reason for such a rule is expressed in the following significant and appropriate terms: "Non enim volenti, scienti, ac consentienti, potest injuria videri facta."—Voet., sec. 9.

[1] Mackenzie, Dec. 19, 1828, 7 S. 215.

[2] In England, the oversman is termed the umpire. As to the mode of devolving the submission upon an oversman, see *infra*, Chap. VII.

CHAPTER II.

GENERAL IMPLIED POWERS OF THE ARBITER.

251. THE powers which are expressly conferred upon an arbiter, and the duties which are expressly imposed upon him, may vary in every instance, according to the views of the parties-submitters, and the circumstances of the particular submission. But there are some powers so manifestly essential to the execution of the office of an arbiter, that they are generally introduced, as a matter of course, into every submission; and these powers, even if they were not expressed, would be implied. Because, if two persons request a third to undertake the performance of an office, on their behalf, they must be understood, by that very act itself, to invest him (so far as in them lies) with every power which is manifestly essential to enable him duly to perform that office, and so to comply with their own request.

252. "In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred, without which the jurisdiction cannot be explicated."[1] This is the rule with respect to public Judges; as it would be plainly inept to make a grant of jurisdiction, for the purpose (of course) of its being exercised, and at the same time to withhold the powers which were indispensable for its exercise. The ratio on which the rule rests would appear to apply also to the arbiter, subject to the qualification, that as his *quasi* jurisdiction is derived merely from private parties, the implied powers which enure to it are only of that limited kind which private parties can bestow. They enable the arbiter, however, as will hereafter appear, to pronounce important orders, in various departments of procedure, against the parties themselves, which they are fully bound to obey.

253. As the arbiter's implied powers belong to him, solely to enable him to perform his duties, his powers are the correlative of his duties. A just appreciation, therefore, of the nature of these duties will afford material assistance in considering the decisions which have determined the extent of his powers. What, then, is the nature of the duties which an arbiter undertakes, by the very act of accepting his office? "All arbiters owe to the particular parties duties of the same nature as those which the King's Judges owe to his Majesty's lieges in general."[2] The precise function which an arbiter undertakes to discharge is that of acting as a private judge between the parties-submitters, and amicably terminating some question at issue between them, by awarding that which he shall consider to be justly due, according to his honest and conscientious opinion.

[1] 1 Erak. 2. 8. [2] Per L. Eldon, in Maule, May 10, 1814, 4 Dow 363.

Now, it is an evident pre-requisite to the discharge of this judicial function, that an arbiter shall adequately inform his own mind regarding the nature and merits of the subject in dispute.[1] This is the indispensable pre-requisite to the faithful performance of the judicial function, whether by a public or a private judge. And, in both cases alike, the necessary means of so informing any judge's mind may be regarded as mainly resolving into three great classes, viz. :—

(1.) The obtaining of a clear and distinct statement from the parties, of the precise question which he has got to decide, and of their mutual averments and admissions relative thereto.

(2.) The ascertainment of the truth of disputed facts, by subjecting them to the test of a proof; and,

(3.) The hearing of parties in support of their respective views and interests.

254. These are the three great departments of averment, proof, and hearing, by the instrumentality of which, in a public Court, a judge informs his mind on the nature and merits of a question at issue before him, and so proceeds to give his judgment. They are the means, equally essential, for enabling a private judge to perform the same judicial function of duly informing his mind. And, accordingly, it is the usual practice, in ordinary contracts of submission, to confer general powers on the arbiter, in the following or similar terms, viz. :—"To receive the claims of the parties, take all manner of probation he may think necessary, by writ, witnesses, or oath of party, and to hear parties thereon." But, though not expressed, these essential powers, as already noticed, would be implied, except perhaps in special circumstances where no proof, by writ or otherwise, was contemplated. Suppose that the meagre and general expressions were wholly omitted which empower an arbiter "to receive the claims of the parties," and that the arbiter, on accepting his office, pronounced an order on the parties to lodge their respective claims, or a claim on the one side, and answers on the other; how could either party object to obey this order, on the ground that no express power had been inserted in the submission, authorising the arbiter to receive claims? Would it not be palpably incongruous and inconsistent, that a party should request a man to act as arbiter in settling a dispute, and yet maintain that he had not thereby authorised him to appoint a statement of the matter in dispute to be laid before him by each of the parties? And if, on comparing the opposite statements of the parties, the arbiter saw that some important facts

[1] There is a pithy observation in the Regiam Majestatem (L. 2, c. 2. sec. 2) as to the duty incumbent on an arbiter, to labour both skilfully and conscientiously in endeavouring to search out the truth :—"Nam judex laborare debet, ad investigandam veritatem."—"Et duplicem debet habere salem; alterum, scientiæ, sine quo est insipidus; alterum, conscientiæ, sine quo est diabolicus."

were averred on the one side and denied on the other, he must further have the implied power of sending such matters to proof. In executing his office, he requires to ascertain the truth of these disputed facts. This can only be done by leading a proof. In executing his office, therefore,—in explicating the voluntary jurisdiction with which the parties have clothed him,—it is essential that a proof of these facts shall be led. It follows, as a consequence from this, that, by necessary implication, the parties, in requesting him to become their arbiter and give them an honest and conscientious judgment on their dispute, authorised him to make an order against them to lead the necessary proof. What the conditions and limitations are, which qualify the arbiter's duty, and his correlative power, on the matter of proof, will be the subject of inquiry hereafter. It is merely noticed at present, that the same general power to order proof is necessarily implied in a submission, which is commonly expressed in it: and that this power is deeply and strongly founded in the very nature of the office which, at the request of the parties, the arbiter has undertaken to perform.[1] The same remarks are equally applicable to the implied power of the arbiter in regulating the hearing of parties.

255. It is now proposed to examine the powers and duties of arbiters in respect to process, proof, and hearing; using the word process here as mainly applicable to that form of procedure, apart from proof or hearing, which is adopted for the purpose of bringing under the view of the arbiter a distinct statement of the precise question at issue, including the mutual averments, admissions, or explanations of the parties. It would be according to the most natural order to consider first the arbiter's power of directing and controlling the form of procedure which is to be followed before him; because the first step, in every submission, must necessarily be that of placing the question in dispute, in a distinct form, under the arbiter's view. Until then, he cannot know whether any proof shall be required, or on what points it may be requisite. But the chief discussions respecting the arbiter's large inherent powers, and also their inherent limitations, have taken place in questions affecting proof and hearing. It will, therefore, be found more satisfactory to consider first the arbiter's power and duty in dealing with proof, and the chief decisions on that subject; next, the arbiter's power and duty in dealing with the hearing of parties; and then his power and duty in regulating the form of process under a submission. His powers and duties in all these three departments will be found to be nearly co-ordinate; and the last subject of the three can be most satisfactorily considered, after a general reference can be made to those rules and principles which have been fixed by decisions regarding the first two.

After disposing of these three important subjects, the other

[1] See *infra*, sec. 256 *et seq.*, 267 *et seq.*

powers and duties of arbiters in the conduct of a submission will be considered.

It will be generally observed, that as the office of an Oversman is truly that of a sole arbiter, the powers and duties of an oversman are of the same nature as those of the arbiters, unless the particular deed of submission has made a distinction between them; in which case the deed itself must be referred to for guidance.

CHAPTER III.

ARBITERS' POWERS AND DUTIES IN REGARD TO THE LEADING OF PROOF.

256. An arbiter possesses large discretionary powers, respecting both the extent and the kind of proof which shall be led in the submission.[1]

257. It is not obligatory on an arbiter to admit a reference to oath

[1] "That an arbiter has full power to control the extent of proof, when he thinks the matter exhausted, and has full power to refuse a reference to oath in circumstances in which that seems unsafe and inexpedient, are points clearly within the trust and duty committed by the law of Scotland to an arbiter."—Per L. J. Clerk Hope, in Mowbray, June 2, 1848, 10 D. 1111.

"I hold that the question, whether proof should be allowed in a submission, is to be determined by the arbiter alone, and that his decision of that question is protected against review, just as his award on the merits is. But his decision, both on the one question and the other, may be challenged on the ground of such misconduct, leading to injustice, as the law holds to amount (without supposing any malicious or evil motive) to what the Act of Regulations intends by the term 'corruption.'"—Per L. J. Clerk Inglis, in Ledingham, Dec. 16, 1859, 22 D. 250.

"The general rule is, that the arbiters are entitled to judge of the propriety of admitting or rejecting evidence. They must be so. Who can ever determine this except the judge?"—Per L. Cockburn, in Mowbray, *supra*, 1125.

"We consider it within the competency of an arbiter, not only to determine the amount of proof upon any particular point of a case with which he will be satisfied, but also upon this, as upon other points of the case, to alter his opinion in the course of the submission, if he sees ground for that course."—Per L. Cowan, Benholme, and Neaves, in Miller, Mar. 10, 1855, 17 D. 721.

"An arbiter is entitled to say, 'I have had proof enough already, and I will hear no more.'"—Per L. Jeffrey, in Mitchell, June 17, 1848, 10 D. 1309.

"An arbiter is not bound, in all cases, to receive evidence, whether it will have any effect on his mind or not."—Per L. Eldon, in Johnston, July 10, 1817, 5 Dow 247.

See also Mackenzie, Dec. 19, 1840, 3 D. 318; Young, July 2, 1678, 2 Suppt. 230; and Colquhoun, Jan. 13, 1825, 3 S. 298: in which last case it was held competent to a judicial referee to decline to take a proof which had been allowed by interlocutor of Court, before the reference was entered into; the referee considering the proof to be unnecessary.

[See also note 1, p. 24.]

of party, if, in the circumstances, he considers such a course to be inexpedient or improper. And in a case where an arbiter had refused to admit such a reference, the Court, in sustaining the award, are reported to have been "perfectly clear that an arbiter had just the same power of determining what proof he would admit, as in determining what was the import of the proof." [1]

258. It will not afford ground for reducing an award, though the arbiter, in ignorance of the law, has both received and founded on evidence which a Court would have held to be incompetent.[2] In so acting, an arbiter has merely formed an erroneous opinion on the law of evidence. And "I never heard," said L. Glenlee (in Spearman, etc., Feb. 28, 1828, 6 S. 645), "that it was *ultra vires* of an arbiter to form a wrong opinion."

259. In like manner, though an arbiter has rejected evidence which a Court of law would have admitted, this will not render the award liable to reduction. "Arbiters may possibly have erred in judgment, and refused to receive evidence where a judge in a Court of law would not have refused it. But the party complaining of the judgment chose the arbiters to be his judges in the matter; and it was wholly and entirely submitted to them, with power, of course, to deal with it according to the views which they might form of the justice of the case, and the interests of the party so submitting it to their determination." [3]

[1] Kirkaldy, June 16, 1809, F. C. See explanations as to this report by L. J. Clerk Hope, in Mowbray, June 2, 1848, 10 D. 1114. A reference to oath was also refused by the arbiter in Berry, Dec. 15, 1827, 6 S. 256, and Jan. 26, 1831, 9 S. 337. A reduction was brought on this and other grounds, but the award was sustained. See Session Papers.

[2] "The arbiter has admitted a document which the pursuers say he should not have admitted. It is not clear that he did hold it as evidence, in a strict sense. But supposing that he had done so, what then? Who was made the judge of what evidence should be received? By their own contract, the pursuers excluded all Courts of law from looking into any such question, and made the arbiter the sole judge of the competency, equally as of the effect of evidence. Their very utmost averment in this reduction is, that the arbiter committed an error of judgment." "Unless all the ordinary principles which govern arbitration in the law of Scotland, and all the force of the Act of Regulations, are to be abandoned, there is, in the L. Ordinary's judgment, no relevant ground stated for reducing this decreet-arbitral," —Per L. Moncreiff, in Alston, etc., Dec. 17, 1839, 2 D. 248. The Court unanimously adhered to his Lordship's judgment, sustaining the award.

See also 1 Bankt. 23. 11.

[3] Per L. Moncreiff, in Mowbray, June 2, 1848, 10 D. 1122. On this subject, the following observations were made by L. Mackenzie, in Ferrier, Jan. 28, 1843, 5 D. 456:—"It is stated in the papers, though it has not been urged at the bar, that there exists this special objection, that the arbiter wrongously refused to examine Mr. Alison as a witness. I am by no means satisfied that he was wrong in this; but if he had been ever so far wrong, the matter is totally irrelevant. It never was held, that if an arbiter judges fairly of the competency of evidence, and happens to be wrong, his decree can be set aside on that account."

260. Even when an arbiter admits evidence which he is well aware would be held incompetent in a Court of law, and accordingly states in his notes that he is departing from the rules of evidence in so admitting it, yet, if he acts under the belief that it will be satisfactory to his own mind, in the conscientious performance of his duty to the parties, to take the evidence into consideration, his admission of it, and relying on it in making up his award, will not afford any ground for reducing the award.[1]

[1] Grant, June 23, 1820, F. C. See also Session Papers. Girdwood and Co., and Fleming, merchants in Glasgow, having claims against each other which involved a mutual accounting, entered into a submission of their differences to an accountant, as sole arbiter. In the course of the accounting, a question arose respecting certain bills, on which Girdwood and Co. were the drawers, and Fleming the acceptor, and which had been retired by Fleming, and were now held by him. Girdwood and Co. alleged that they had supplied the funds to Fleming, with which he had retired them. Fleming alleged that he had retired them with his own funds. The arbiter consulted counsel, whether Girdwood and Co. could, by law, be allowed a proof *pro ut de jure* of their allegations; and he was advised that they could only prove them by the writ or oath of Fleming. The arbiter resolved, nevertheless, to investigate the fact by admitting all evidence which he himself considered to be useful in expiscating the actual truth of the case.

In his notes, the arbiter stated that he thus admitted evidence which, "he was fully aware," "would not, in a Court of law," have been received; but, "notwithstanding, the arbiter is satisfied of the propriety of allowing the proof." He then stated the considerations by which, in his own conscientious judgment, he had been guided when he "departed from the rules of evidence in admitting witnesses."

After considerable procedure, the arbiter issued notes, resulting in the conclusion that, "on the whole matter, Mr. Fleming is indebted to Messrs. Girdwood and Co. in the sum of £1438, 3s. 2½d."

These notes were followed by an award, narrating, *inter alia*, that the arbiter had heard parties, and "taken such evidence as I judged necessary for elucidating the whole matters in dispute between the parties; and having called upon Hector Grant, the trustee on the estate of the said Robert Fleming (which has been sequestrated during the dependence of the submission), to make appearance in the same, for the interest of the said Robert Fleming's creditors; and being well and ripely advised," etc. The award then proceeded to find Fleming indebted to Girdwood and Co. in the foresaid sum of £1438, 3s. 2½d.

A reduction of this award was raised by Grant, stating as the second reason of reduction: "That, during the dependence of the said submission, and before the bankruptcy of the said Robert Fleming, certain allegations were made by the said Claud Girdwood and Co., which could only, by law, be proved by the writ or oath of the said Robert Fleming; notwithstanding whereof, the said John M'Gavin, as arbiter, pretended to investigate the said allegations by evidence of a different description; and, in notes issued by him, intimated that the incompetent evidence, so resorted to, was held by him as establishing the said allegations; and he ultimately pronounced the said decreet-arbitral, giving effect thereto in sustaining the claim of the said Claud Girdwood and Co., as before recited; whereby the said John M'Gavin exceeded the powers conferred on him by the said submission, and thereby materially injured the complainer," etc. The third reason of reduction related to the supervening sequestration of Fleming, and is noticed elsewhere.

Defences were lodged by Girdwood and Co.; and in the course of the pleadings, the notes issued by the arbiter were laid before the Court. The L. Ordinary,

261. But wherever the proof tendered is essential to the plain justice of the case, insomuch that the arbiter cannot conscientiously decide the case without it, and consequently fails greatly in his duty in rejecting it, such rejection will expose his subsequent award to fatal challenge.[1]

262. In describing the extent and degree of miscarriage by an arbiter in the undue rejection of proof, which will certainly, and under all circumstances, be fatal to his award, it may be difficult to state any general rule in lower terms than those of the preceding section. But it will be kept in view, that a rejection of proof may often fall much short of this, and yet may expose the subsequent award to challenge, more or less perilous, according to the circumstances of the case. And, generally speaking, every right-thinking arbiter, in the faithful performance of his office, should hold his mind frankly open and accessible to all material evidence which is timefully tendered by either party, to enable him more accurately to appreciate the facts of the case, or the rights and interests on which he has to adjudicate. This is not only the course which gives most satisfaction to the parties, but also that which is safest for his own ultimate award.[2]

Pitmilly, pronounced an interlocutor, in which, after repelling a plea connected with the sequestration of Fleming, his Lordship "repelled also the second ground of reduction stated in the summons, as irrelevant; sustained the defences," etc. The Court, on considering a reclaiming petition and answers, unanimously adhered.

The clause of the interlocutor above quoted, is omitted in the Faculty Report, which only notices the point arising out of the sequestration of one of the parties, pending the submission. But the clause itself is interesting in arbitration-law; and the entire interlocutor will be found quoted in the Session Papers in the Advocates' Library.

[1] "To support a challenge (of an award) on that ground (refusal to allow proof), it would, at all events, be necessary to make out that the proof offered was absolutely essential to the justice of the case, and that it was impossible conscientiously to decide the case without it."—Per L. Fullerton, in Macdonald, Dec. 8, 1843, 6 D. 189.

"I am by no means prepared to hold, that there may not be a case, in which the refusal to admit evidence, where evidence is clearly necessary and essential to justice, may not, by itself, and without any other considerations, be a sufficient ground on which to challenge the decree effectually. I think that the cases have settled the law otherwise."—Per L. Moncreiff, in Mowbray, June 2, 1848, 10 D. 1121.

"The deliberate refusal to allow a party to adduce evidence, when such evidence is demanded on matters essential to the question at issue, and necessary for the plain justice of the case, is a sufficient ground for reducing a decree-arbitral." —Per L. J. Clerk Hope, in Mowbray (*supra*), p. 1109.

"I think the refusal of proof must amount to a gross breach of duty on the part of the arbiter. I remember a case, never carried to appeal, in which L. Pres. Blair held a refusal to allow a reference to oath not sufficient. Generally, I think the mere circumstance that there has been a refusal to take evidence, is not absolutely sufficient as a ground of reduction, unless it infers a great failure in duty."—Per L. Mackenzie, in Macdonald, Dec. 8, 1843, 6 D. 188.

[2] The case of Millar, Mar. 10, 1855, 17 D. 689, affords a striking illustration, both of the extent of an arbiter's powers in regulating the kind and amount of proof which he will admit, and also of the hazard to which his award is exposed by

263. Where a mercantile dispute was submitted to mercantile men, under circumstances which distinctly implied that prompt despatch was desired from them; and written claims by each party were considered by the arbiters; after which, both parties at a *vivâ voce* hearing, apart from either counsel or agents, made their mutual statements and admissions personally to the arbiters; it was held, though with great difficulty by some of the Judges, that an award was not reducible which the arbiters had resolved upon immediately after the hearing, and which they proceeded afterwards to pronounce, in the face of a distinct offer of proof of a fact which, if substantiated, was subversive of the claim sustained by the award. The offer of proof was made subsequently to the above hearing, and to the arbiters' intimation that they had formed their opinion upon the case.[1] There was no allegation

the rejection of competent and relevant evidence. The whole Court were consulted, and the award was only sustained by the narrowest majority of the Judges.

It may be remarked, that in the rubric of this Report, the words occur, as if stating a general doctrine, that "there being a refusal of proof, such as leads to injustice, the decree is reducible." But these words must be meant in a qualified sense; otherwise they would sanction the reduction of a decree-arbitral on the head of mere iniquity, which is fundamentally opposed to the law of arbitration.

[1] The purchaser and seller of 100 tons of potatoes, which had been bought and delivered at short intervals, and which had all been exported by the purchaser, were at issue whether the potatoes were diseased when delivered. The seller claimed a balance of the price, still unpaid; the purchaser claimed repetition of the price so far as paid, and also damages. After a correspondence which showed that both parties desired a prompt adjustment of their dispute, they submitted the question to two mercantile men, who received written claims from both parties; and thereafter appointed a hearing of the parties themselves, without counsel or agents. A meeting took place, where the parties, *vivâ voce*, made their respective statements and admissions to the arbiters. No record was kept of what then took place. It was not alleged that the arbiters had acted partially or unfairly at the hearing. Immediately after it was over, the arbiters issued a note, intimating that they had formed a clear opinion in favour of the seller. The buyer then offered to prove that the seller knew the potatoes to be diseased, at the time of delivering them; and he craved to be allowed a proof. The arbiters disregarded this offer, and executed a formal award in favour of the seller, which was brought under reduction at the buyer's instance. The Judges unanimously, though some of their Lordships with very great difficulty, sustained the award.

L. J. Clerk Hope observed that in the written claim, there was no express averment by the pursuer, that the seller knew the potatoes to be diseased. Apart from that averment, there were views which the arbiters might adopt (upon the circumstances stated in the claim, and the oral explanations of the parties), according to which (whether sound and legal or not) they might decide in favour of the seller, without these views actually involving "perverse or proper misconduct." When the subsequent express offer of proof was made, the arbiters might "think that an afterthought, brought forward after their opinion was known, and so refuse to attend to it, as not truly part of the case as submitted to them for decision. On the whole, therefore,—although I think the matter the most unsatisfactory case as to a decree-arbitral which I ever saw,—yet, with difficulty, I have arrived at the result, that the ground of reduction, most relevant, useful, and salutary in law, has

that either of the parties had been unfairly treated by the arbiters at the *vivâ voce* hearing. And the Court considered that admissions might then have been made (and presumably then were made) by the

not in this case been sufficiently and fully established in the actual circumstances of the procedure before the arbiters."

L. Medwyn observed that the case resolved into this—"Could no honest opinion be formed on the question, without admitting the proof offered? Could the arbiters arrive at their conclusion, only from something improper in their conduct, contradistinguished, as it must be, from an error in judgment? Now, they had the written claims before them, and they called the parties and heard their statements, explanations, and admissions. They thought no further proof necessary—that enough was admitted. This may have been an erroneous opinion, but is that a ground for setting aside a decree-arbitral? Does that amount to 'corruption'? Now, in the absence of all appearance to the contrary, we are bound to hold it a most honest opinion, and it may have been a sound opinion." His Lordship then stated various views, according to which he considered that the award might have been well founded in all respects; and added, that at least they were exclusive of "any such misconduct as to amount to 'corruption,'"—the arbiters, after hearing parties, having merely "rejected the proof offered, on the ground that it would not influence their decision."

L. Moncreiff, after adverting to the difficulty which he felt in dealing with the case, and to the very remarkable offer of proof which the arbiters had rejected, said that, nevertheless, "I have felt a strong duty laid on me, to take care that we do not weaken the general principle of the law of Scotland, concerning such deliberate sentences in arbitration; and, although with some difficulty, I have come at last to be satisfied that we cannot safely refuse effect to this decree-arbitral. In coming to this conclusion, I do not feel myself called upon to form any opinion on the rightness or abstract justice of the proceeding of the arbiters," etc.

"The question is not what the Court may think might, or ought to have been done. The only question is, whether the arbiters, to whose judgment all was referred, must be held to have so flagrantly violated the duty undertaken, that their judgment must be superseded, and the parties, after all, landed in a difficult and expensive litigation in this Court?" His Lordship then adverted, *inter alia*, to the importance of the personal hearing which took place before the arbiters, and observed: "We do not know what may have occurred when the parties appeared before them. We do not know what admissions may have been made, or what pleas may have been put forward," etc. "For anything we know, the pursuer may at that time have declined, or not urged his offer to lead proof, trusting to supposed admissions. We only know that both parties were heard; and it has not been said that they were unfairly heard, or that either of them complained of anything which passed when they were in the presence of the arbiters."

L. Cockburn concurred; and, *inter alia*, adverting to the great importance of the hearing before the arbiters, observed: "How do we know that the pursuer did not, in many ways, admit himself out of Court?" "According to the pursuer, there was no possible statement or admission by him that could prevent the arbiters from being 'corrupt,' if they did not allow him a proof. If there was such a statement or admission possible, then we have no reason to believe that it was not made," etc. "There is not a vestige of authority that I have yet seen, for holding that 'corruption' is always to be inferred from the fact that, after parties were heard, the arbiters deemed proof unnecessary. I am confident that no precedent can be cited for holding that such corruption can even be presumed, where the rejection was preceded by written explanations, and a personal meeting with the parties, which satisfied the arbiters. Such a precedent could not be furnished now, without decid-

parties, directly to the arbiters, which were sufficient to warrant them in forming their opinion upon the case, and in following it out to an award.

264. As the sole object of adducing proof is for the purpose of informing the mind of the arbiter, it may often happen that an arbiter not only conscientiously, but also very reasonably, considers that his own information is sufficient to warrant him in dispensing with the whole, or with part, of the proof which is tendered by the parties. For example, this may occur when an arbiter is chosen as a man of skill, and when a careful inspection of premises (or some other subject in dispute) is to supply the principal information as to the merits of the question in issue. After such an inspection by an arbiter, accompanied by both parties, he will frequently be able to decide, both conscientiously and satisfactorily, without further evidence being led before him; and in these cases, although his rejection of tendered proof may give dissatisfaction to the party, it can afford no ground for challenging his award.[1]

265. An arbiter was chosen by four conterminous proprietors, in respect of his skill and experience, to superintend certain drainage operations, and to assess the expense upon each of them respectively, in the ratio of the benefit to be derived by their several estates from the operations. Before an award was given, one of the parties (Johnstone) offered a proof of certain alleged facts as to localities, levels, etc., which, as he contended, would demonstrate that the just ratio of the benefit to his estate, and of the consequent share of expense to himself, did not exceed one-twelfth part of the whole. The arbiter, who was himself a neighbouring proprietor, and had good knowledge of the ground from personal inspection, considered himself competent to judge of the effect of the alleged proof; and holding that, even if it were fully led, it would not influence his judgment, he refused to allow the proof. He thereafter gave an award, which found the total expense of the operations to be £759; and he imposed £534 of this upon Johnstone, who brought a reduction on various grounds, including the undue rejection of his offered proof. The award was sustained, both in the Court of Session and in the House of Lords, where L. Eldon observed: "An arbiter is not bound,

ing that, where proof is offered, the arbiters are not entitled, even by the parties' personal disclosures, to be satisfied without it,—a principle fatal to arbitrations."

The award, accordingly, was unanimously sustained.—Mowbray, June 2, 1848, 10 D. 1111.

[1] "An arbiter may, in some cases, think that his own information is sufficient to enable him to do justice; he may determine that proof is irrelevant or unnecessary, and refuse to receive it." Per L. Fullerton, in Mitchell, June 17, 1848, 10 D. 1308. See also MacNair, Feb. 16, 1855, *infra*, sec. 281, note; Ledingham, Dec. 16, 1859, 22 D. 245. [Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271; Mackenzie *v.* Visct. Hill and Tennant, June 2, 1868, 40 Jur. 499.]

in all cases, to receive evidence, whether it will affect his mind or not."[1]

266. An oversman was chosen for his personal skill and knowledge to value certain lands which were excambed. He perambulated the lands, and carefully examined them; and thereafter rejecting an offer of certain evidence as to the value of the lands, which was made by one of the parties, he gave his award. That party brought a reduction, *inter alia*, in respect of the undue rejection of evidence. The award was sustained.[2]

[1] Johnstone, July 10, 1817 (Eden case), 5 Dow 247. The award narrated that the arbiter had "frequently gone over and inspected the ground," and had "heard parties as to their claims," and had "got all the information which I consider necessary for determining the matters submitted to me," and had "maturely deliberated on every circumstance relating thereto." In his appeal Case (p. 1), Johnstone stated that, with respect to the particular localities, levels, etc., as alleged by him, he "offered to prove, by the evidence of men of skill—and, indeed, the point is susceptible of mathematical demonstration to those acquainted with practical geometry—that not one-twelfth part of the benefit derived (from the operations in question) falls to his share. It follows that not more than one-twelfth part of the expense ought to have been imposed upon him."

Johnstone therefore contended that the refusal to allow such proof, and the enormous excess of expense laid on him, indicated partiality and corruption by the arbiter, within the meaning of the Regulations 1695.

This was open to the answer, that the assumption of there being any excess of expense laid on Johnstone, was a mere *petitio principii*, and that, although practical geometry might absolutely ascertain the relative physical heights of certain levels, etc., and drains, etc., the question of the amount of benefit derived from the operations conducted under the arbiter's superintendence, was inherently, and *sua natura*, a question of opinion and inference, and that the arbiter, being himself a man of skill, and familiar with the localities, was entitled to rely on his own knowledge, and to refuse to listen to a proof which he was satisfied must be nugatory, as it would not affect his judgment. L. Eldon observed (5 Dow, p. 264): "Then it is insisted that the arbiter acted with a partiality that indicated corruption. That, however, depends on the view which he took of his duty; for an arbiter is not bound, in all cases, to receive evidence, whether it will have any effect on his mind or not. The submission bore that Mr. Thomson was chosen arbiter because he himself knew the subject. But he saw all the evidence, and all the inferences arising out of the circumstances, and he seems to have proceeded on this ground: 'Taking all these matters to be facts, yet having my own local knowledge to guide me, and all the other circumstances in my view, I cannot adopt your conclusion.' So that, on all these grounds, I take the judgment of the Court below to be right."

[2] Macdonald, Dec. 8, 1843, 6 D. 186.

In this case, the award set forth that the oversman had "carefully perambulated and examined the lands, islands, and others, and was well and ripely advised," etc.

L. Jeffrey observed: "There may be cases in which the refusal of proof would amount to 'corruption,' in the sense in which it is now received in practice, and be a ground for reducing the decree. For instance, if an arbiter, who knows nothing of the case, decides it off-hand without inquiry, and in the face of an offer of proof, that would be such a manifest violation of duty, and disregard of justice, as to amount to a ground of reduction. But take an opposite case. Suppose the subject of the reference is a claim of damages for an assault, which the referee had himself witnessed from beginning to end, would his rejection of an offer of

267. It has already been noticed, that an arbiter's power to order such proof as he finds necessary *ad informandum animum*, is inherent in the constitution of his office, insomuch that, even if a submission contained no clause expressly bestowing power to take a proof, the arbiter's power to do so would be implied. The principle on which this position rests has been already adverted to;[1] it appears also to be consonant with practice and authority. In the large class of submission-clauses which are introduced into articles of roup, for the purpose of empowering arbiters to decide any emerging disputes between the purchasers and exposers at the roup; and, again, in that large class of submission-clauses which are introduced into leases, empowering arbiters to determine the sum which shall be paid, at the expiry of the lease, to the outgoing tenant, for his stocking, when it is to be taken off his hands, or for the meliorations which he shall have made on the farm buildings, etc.; it is not uncommon to frame such clauses, without inserting any express power to the arbiters to lead proof, or to hear parties,[2] etc. Yet the arbiters exercise all these powers, without hesitation, whenever they find occasion to do so.

proof by some other bystanders be a ground for setting aside his decree? That really comes very near the present case. When there is a dispute as to the value of a subject, sold without specifying the price, and reference is made to men of skill in the matter, can it be maintained that they are bound to receive proof in supplement of their own knowledge of the subject? Here I think it conclusive, that the matter on which proof is offered, is the matter of value, which, in the preamble of the submission, it is said the parties agreed should be referred to persons of skill, and was therefore referred to the arbiters. While, therefore, I should be sorry to give the least countenance to the idea, that an arbitrary power to do injustice, is given by a submission, I would also be sorry to detract from the salutar rule by which the ground for interfering with decrees-arbitral has been limited. see nothing in this case amounting to 'corruption,' in the most extended sense in which we have ever received it; and I therefore entirely concur in the interlocutor of the L. Ordinary."

L. Mackenzie.—"The alleged failure was to take the evidence of other skilful persons. Now, am I to hold that an arbiter does anything 'corrupt,' when he is himself acquainted with the subject, by taking his own opinion? I cannot hold that, and I therefore think there is no ground for reducing the decree. I go upon this, that there was no gross failure in duty."

L. Fullerton concurred.

L. Pres. Boyle dissented, regarding it as a case in which "the party had not been sufficiently heard."

[See also Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271; Mackenzie *v.* Visct. Hill, June 2, 1868, 40 Jur. 499.]

[1] *Supra*, sec. 251 *et seq.*

[2] See styles of lease, containing submission-clauses, 2 Hunter, 596 *et seq.* [4th ed., 625 *et seq.*] See also Macgregor, May 20, 1847, 9 D. 1056, where an attempt was nevertheless made to reduce an award (pronounced under a submission-clause of this description), on the ground that the oversman had *not* ordered a hearing of parties before deciding. In the course of the discussion, no doubt was ever hinted by the parties, or by the Court, as to the oversman's *power* to have ordered a hearing, if he had thought fit.

And so, in like manner, in that more formal class of ancillary submissions, in which a submission-clause is introduced into a contract for the execution of some extensive work, it frequently happens that the submission-clause contains no grant of express power to the arbiter, either as to proof or hearing. But as soon as disputes arise, and the submission-clause is brought into activity, the arbiter necessarily exercises these powers, in proceeding to perform his office.[1] And although the validity of his awards, and generally of any alleged erroneous procedure of his, is often the subject of keen contest, it appears never to have been doubted that his power to take proof was inherent and implied in his office, though no express grant of such power was embodied in the submission-clause.

268. There is at least one case in which the arbiter's power to lead proof was directly sustained, notwithstanding the entire absence of any clause in the submission granting such power. It is true, that certain special circumstances were founded on by the parties, *hinc inde*, for the purpose of raising presumptions on the one side, that the submission was positively intended to grant such power; and on the other side, that it was positively intended to exclude it. But it would rather appear, on examining the circumstances, that the Court pronounced a decision which was truly rested, not on specialties, but on the proper and inherent power of the arbitral office. The opinions of the Judges, however, appear not to have been delivered at length.[2]

[1] Blaikies, Jan. 28, 1851, 13 D. 527; Anderson, Feb. 27, 1850, 12 D. 781. These are recent instances in which the ancillary submission-clause contained no express powers to lead proof, etc.; but the arbiters at once exercised such powers, as inherent in their office.

[2] Berry, Dec. 15, 1827, 6 S. 256, and Jan. 26, 1831, 9 S. 337. See also Session Papers in the Adv. Library.

When an action was taken out of Court, on the footing of a "concluded cause," the parties submitted the "whole grounds of the claim or debt on which the said action or process is founded, with said action itself, together with the whole objections or defences which have been lodged therein, with full power to the arbiter to consider the said claim and the process; and whatever he shall determine," etc., the parties bound themselves to implement. There was no clause empowering the arbiter to lead proof; it was alleged that this power had been withheld, *ex proposito;* and when one of the parties craved leave to adduce parol proof, this was opposed by the other party as incompetent, from want of power in the arbiter.

In issuing notes of opinion on this objection, the arbiter (James Reddie, Esq., advocate, Assessor to the City of Glasgow) stated that the omission of the usual clause, giving power to lead proof, was undoubtedly an important circumstance; but added: "At the same time, it seems to be clear, that the very act of reference to an arbiter necessarily implies, although not expressed, the power of taking such evidence as is indispensably requisite to enable the arbiter to discharge the office conferred upon him. Indeed, the power of ascertaining the facts, as well as the law and equity of the case, is inherent in the very idea of arbitration."

The arbiter, accordingly, allowed proof to be led, as craved.

A bill of suspension of a charge on the award was refused, and in a subsequent reduction of the award the Court assoilzied.

269. As it is in the judicial nature of the arbiter's office that his inherent power of leading proof is strongly founded, it follows that, from the same foundation, that power derives an inherent limitation, which perpetually qualifies the mode of exercising it. Whether in admitting or in rejecting proof, the obligation upon the arbiter is absolute, to act with even-handed impartiality to both parties alike. Both parties possess an equal right to inform the arbiter's mind, and he is bound to hold his mind accessible to the information of both, upon equal terms.

270. In particular, if the arbiter has thought it right, in the performance of his duty, to allow a proof to both parties, and one party has led his proof, the arbiter is not entitled to found on that proof, and to decide the case against the other party without having afforded him due opportunity to adduce his proof also.[1] The arbiter is no more

[1] For an infringement of this rule, an award was reduced in the following circumstances:—An arbiter had allowed a proof to both parties. One of them led his proof. The other, whose chief proof was to be taken abroad, was prevented by an accident, and without his own fault, from timefully executing a commission which had been granted to him; and the arbiter, nevertheless, refused to renew the commission. This he was held to have done (at best) from mere impatience at the delay which a renewed commission would occasion. The arbiter then proceeded to consider the proof, which was substantially one-sided, and to give an award, which, *in gremio*, narrated that he proceeded upon the consideration of the proof adduced. The Court unanimously reduced the award. The opinions delivered are so instructive, that it is difficult to abridge them greatly. L. Fullerton observed: "The powers of arbiters are not in all points absolute, because there are some implied obligations on the arbiter, as strong as if they had formed the subject of express provision in the submission itself, and any breach of them will necessarily expose the award to challenge."

"Thus, all decisions on the merits of the claims of the parties are of course final and unchallengeable by our law. And even determinations as to the procedure by which the arbiter's knowledge of the merits is to be obtained, are, in the general case, within his competency. But, in this last matter, there is this limit to his powers, viz., that he shall do strictly equal justice between the parties—that he shall not allow to the one that which he denies to the other. For the condition of the equal footing on which the parties stand, and of their equal rights to inform the arbiter's mind, seems to me a necessary implication in the whole transaction."

"An arbiter may then, in some cases, think that his own information is sufficient to enable him to do justice; he may determine that proof is irrelevant and unnecessary, and refuse to receive it. But, most unquestionably, if he hears one party, he cannot refuse to hear the other. And, in the same way, if he allows a proof, he cannot decide on the proof brought by one party, to the exclusion of that which is brought, or offered to be brought, by the other. Whether this can be brought under the head of 'corruption,' or is to be viewed, perhaps more justly, as a breach of an implied condition in all submissions, it is unnecessary to inquire. The competency of challenging a decree-arbitral, on such a ground, must now, since the decision in the case of Sharpe, be considered as a fixed principle of our law."

"There can be no doubt that, in this case, that principle was infringed. If the arbiter had adhered to his judgment of 29th April 1845, refusing a proof, that judgment might have been safe. But he altered it," etc., and allowed both parties

entitled to decide upon a one-sided proof than upon a one-sided hearing; provided always that the want of proof is not the consequence of the party's own fault.

a certain proof. His Lordship then stated that his proceedings resulted in this, that "he decided on the proof taken by one party, without waiting for the proof to be taken by the other."

His Lordship further observed, that, in the circumstances, the arbiter's refusal to prorogate the time for reporting the proof, proceeded merely from a "fit of impatience," and without any fault imputable to the party who was thus cut out of his proof. He therefore held that "the decreet-arbitral cannot stand."

L. Jeffrey.—"The true principle is, that an arbiter's decreet-arbitral can stand only when he has done his duty fairly. I do not mean fairly in reference to his moral dispositions; but he is bound to show this Supreme Court that he has dealt fairly, that is equally, with both parties; otherwise, it must be held that he has violated the contract of submission, and acted *ultra vires compromissi*." "In the case of Sharpe, a principle was laid down by the House of Lords, which is enough for our guidance in the present case, viz., that an arbiter must not hear evidence on one side only."

His Lordship then observed, that the arbiter might have validly refused, from the first, to allow proof by witnesses, and proceeded solely on the written evidence produced; or, after allowing a parol proof, on the representation of one party, he might have competently recalled his interlocutor, and refused it on the counter-representation of the other. He had also great latitude in determining whether a party had, in his opinion, been so dilatory that no further time should be allowed him. But the present case stood clear of all this, and seemed to be very near the case where, one party having led his proof in this country, and the other having led his proof abroad, "the report of the foreign evidence perished *damno fatali*, in its transmission to this country; and that the arbiter then proceeded to decide the case upon the evidence led. Could such an award be said to proceed upon a due consideration of the evidence? Could it be allowed to stand?" L. Jeffrey held that it could not, and that such procedure by an arbiter amounted to "corruption," within the meaning of the Article of Regulations, as interpreted in the case of Sharpe.

L. Pres. Boyle observed, that the decision of an arbiter was not to be lightly set aside, but that in this case the arbiter had seen it "his duty to allow this proof," and thereafter had positively refused to wait until the proof could be taken and reported. In these circumstances, the arbiter's "interlocutor just proceeded on this, that he had considered the proof taken under the order of 17th June, which consisted of six depositions taken for the defender, and one for the pursuer. The question, then, comes to be, whether the arbiter was entitled to proceed to judgment upon this very partial and one-sided proof?" "I hold that the plainest principles of justice demanded that that proof (the pursuer's) should be before him,—that one party should not be entirely foreclosed from leading evidence, while the judgment proceeded on the *ex parte* evidence of the other."

L. Mackenzie concurred, and thought that the arbiter's procedure amounted to "corruption," within the meaning of the Article of Regulations, which must go the length "of including any plain failure in duty, distinct from an error of judgment." His Lordship thought there was more than an error of judgment; there was misconduct on the part of the arbiter: nothing morally wrong, but "a fault" committed through impatience. "It is a very plain thing, that, after the arbiter had allowed a proof, he was bound to consider it. If the question had been, whether, after having allowed the proof, he might change his mind, recall his judgment finding the averments of the claimant relevant, and decide the case without looking at the proof, I am not prepared to say that I would hold it incompetent for him to

271. This does not prevent the arbiter from rejecting the whole, or any part, of the proof tendered by one party, if he thinks it irrelevant or unnecessary, while he admits the whole or any part of the proof tendered by the other, if he holds it to be relevant and pertinent. In so proceeding, he acts with perfect impartiality to both parties alike, and applies the same rule to both, viz., that of rejecting all evidence which he himself holds to be irrelevant or unnecessary. He keeps his mind accessible to the information of both parties upon equal terms: and he is not, and cannot be, required to do more: his power of rejecting proof, however, on either side, being always inherently limited, as noticed *supra*, sec. 261.

272. It is indispensable, as part of the even-handed impartiality of an arbiter's procedure, that proof should not be led in the presence of one party only, without the other, or at least without due notice having been given to the other to attend.[1] After such notice has been given, if either party is absent, without stating a sufficient excuse, it is competent to the arbiter to proceed with the proof. Otherwise, any recalcitrant party might stop the progress of the case, at his own pleasure, by merely absenting himself whenever he chose.[2]

273. It is not a matter of mere form, but of substantial justice, that both parties shall be present when proof is led by either of them. One party may have objections to the competency or relevancy of the line of interrogation taken, or to the particular questions put, by the other. He may be able, by cross-examination, to destroy or to weaken the credibility of an adverse witness; or to elicit new facts, giving a different character to the testimony delivered by any witness in his examination-in-chief. It is impossible, therefore, to say to what extent false impressions may have been produced upon the mind of

do that. It is even doubtful whether he could thus rescind his judgment, allowing a proof, and proceed to decide the cause without having it in view at all. But how can an arbiter pretend that he is entitled to look at the proof on one side, and exclude the evidence on the other? That is worse than a total exclusion of proof. Yet that is very nearly what the arbiter has done here; and on these grounds I must sustain the reasons of reduction."—Mitchell, June 17, 1848, 10 D. 1297.

In connection with this case, it may be noticed that, in England, "the award may be impeached, if the arbiter make his award without having heard all the evidence, or having allowed the party reasonable opportunity of proving his whole case."—Russ. 647, [4th ed., 647].

[1] Heggie and Co., Feb. 1, 1825, 3 S. 339; Drew, Mar. 8, 1855, 2 Macq. 1. See law of England as to this.—Russ. 186, 188, [4th ed., 176-178].

It has been held in England, however (where the above rule appears to be fully recognised), that "it is no objection to an award, that the arbitrators have, in the absence of one of the parties, called in the other, and have asked him whether he admitted or disputed certain items in an account, and have merely taken his answer to that question."—Anderson, March 15, 1835, 3 C. and F. 26.

[2] The same rule obtains in England.—Russ. 197, [4th ed., 188.—See also Cox v. Binning, Dec. 18, 1867, 6 Macph. 171].

an arbiter; or colourable evidence may have been placed on record in the submission if any *ex parte* proof has been led before him. To follow such a course, even in the most limited degree, is highly dangerous, and can seldom fail to be fatal to the subsequent award.

274. Undoubtedly, in regard to the latitude which shall be allowed to a party, in exercising his right of cross-examining the witnesses of his adversary, he is largely, if not wholly, in the hands of the arbiter. So he is also, in respect to the weight which shall be given to his objections to any line of examination which his adversary is following up, or to other similar objections. But his right to be present at the proof, and to have due and timeful notice of the diet fixed for the purpose, that he may, if he choose, be present, so that he may exercise his various privileges as a litigant, to the full extent to which the arbiter, on hearing him, shall find him entitled, seems to be so vitally important, that the withholding of it, whether by omission or intention, would, in most, if not in all cases, render the subsequent award liable to reduction.

275. Although the arbiter has allowed a proof, it does not follow that the right of the party to lead it is absolute and unconditional. It may occasionally be not only competent, but requisite, that an arbiter should proceed to give his award, notwithstanding that one of the parties has not adduced his evidence. This "may be owing to the party himself, who may either waive the opportunity of bringing proof, or act in such a way as to warrant the arbiter in holding that he has either waived the benefit or forfeited it."[1]

276. "If full time is allowed, and the party has failed to avail himself of it, he may be held as confessed."[2] If a party, in place of adducing his proof, "applied for prorogation after prorogation, the arbiter is entitled to say, 'You have been wilfully dilatory; I am satisfied that you are conscious you have no case, and that your only wish is to create undue delay; I will decide the case as it stands.' Such a proceeding would be perfectly competent."[3]

277. "But if the case stands clear of any such personal imputation on the party; if it is one of pure accident—if, for instance, the proof taken by one party is lost at sea or destroyed by fire—an award pronounced by an arbiter on the *ex parte* proof extant, while the

[1] Per L. Fullerton, in Mitchell, June 17, 1848, 10 D. 1308. See Low, June 2, 1836, 14 S. 869, in which a judicial referee, considering that a party had sufficient time to adduce a certain proof before leaving home for a temporary absence, intimated to the party that he would receive the proof, if led before the party left home, but would not wait for his return. The party left without leading the proof. The referee pronounced an award before his return. The party was unsuccessful in attempting to reduce the decree, which was pronounced in terms of the award of the referee. [In Cox Brothers *v.* Binning and Son, Dec. 18, 1867, 6 Macph. 161, the failure of one of the parties to lead proof was also held not to invalidate the award.]

[2] Per L. Fullerton, in Mitchell, *supra*.

[3] Per L. Jeffrey, in Mitchell.

means remain of obtaining that on the other side, is a clear violation of the principle already alluded to," viz., "that the arbiter shall do strictly equal justice between the parties—that he shall not allow to one that which he denies to the other."[1]

278. Where an objection to a referee's mode of dealing with the proof in a case, resolves merely into this, "that there has been a want of care, or attention, or recollection, in the disposal of the case," it is not a relevant ground for setting aside the award.[2]

279. When an arbiter makes an inspection of ground, or premises, or machinery, etc., it must in general be the safer course, and always the more expedient, that he should be attended by both of the parties. Their special knowledge of the subject, and the sharp stimulus of self-interest by which they are prompted, will often enable them to draw the arbiter's special attention to details of importance, which might otherwise escape his impartial and less keen observation. This is so obvious, that, unless under exceptional circumstances, every arbiter

[1] Per L. Fullerton, in Mitchell, *supra*.

[2] This was stated by L. J. Clerk Hope, with the concurrence of the other Judges, to be the result of the objection to the award in Campbell, Feb. 9, 1843, 5 D. 539. A proof on commission had been led in the Sheriff-Court, after which decree was pronounced by the Sheriff. An advocation was then brought, and the cause was judicially referred. In leading the proof, objections had been taken to some of the questions put to witnesses, which objections were sustained by the commissioner; but the answers were taken down, and preserved under seal. The Sheriff, before pronouncing his decree, had affirmed the commissioner's deliverance on this subject. The depositions, accordingly, remained under seal. The referee disposed of the cause, without having either opened up the sealed depositions, or made any deliverance, finding that the questions therein answered were irrelevant. An objection was taken, that this afforded conclusive evidence that there was a part of the proof to which the arbiter had never applied his mind at all, which was as fatal as if he had heard the proof only on one side. The Court unanimously repelled the objection.

It may be noticed here, that, in the subsequent case of Mitchell, June 17, 1848, 10 D. 1297, in regard to an objection that an arbiter had neither opened a sealed deposition of a witness, nor pronounced any judgment that it ought to remain sealed up, L. Fullerton observed: "I think it was not the duty, and not even within the competency, of the arbiter, to open the sealed packet without some application by the party for the purpose. The pursuer had full opportunity to make such application, if he had chosen; and I therefore think that the circumstance does not afford the pursuer any ground for challenging the decree-arbitral." L. Jeffrey concurred, and said: "I rather think that evidence, sealed up to lie *in retentis*, is to be regarded as a private document, in the hands and at the disposal of the party at whose instance it was taken. He might have moved the arbiter to open the packet; but he did not do so. I therefore think the arbiter could not have competently opened it up of his own accord, as it had not been put in evidence by either party." The witness had been objected to as inadmissible, whereupon the Commissioner took down his evidence, and reported it, under sealed cover, to the arbiter. The award in question was reduced on other grounds. L. Pres. Boyle and L. Mackenzie did not express any opinion respecting the sealed deposition. The L. Ordinary, Robertson (2), in the note to his interlocutor, intimated that he considered the arbiter's conduct in regard to it as involving "a very serious omission."

who conscientiously desires to inform his own mind fully, and also to afford the parties the reasonable satisfaction of knowing that he is doing so, will take care to give them a full opportunity of attending him when he is making an inspection of any subjects in dispute.

280. In many cases, the inspection of premises, etc., is, in substance, equivalent to the leading of a proof. It often supplies an important part of the data on which the arbiter is to rest his award. It should never, therefore, be made by an arbiter, attended by one of the parties only; at least, unless the other party has received due notice, and has failed to attend or to send an adequate excuse. The observance of this rule is, indeed, so important, that any infringement of it is hazardous to the whole procedure, and in many cases would be fatal.[1]

281. It would, perhaps, be difficult to lay down any more absolute general rule in relation to this subject, as any such question is liable to be modified by the circumstances under which it arises. Some views were expressed to this effect in a recent case, in which the subject-matter submitted was the value of a quantity of coal left by the outgoing tenant of a colliery, and in which an award pronounced by an oversman was brought under reduction on various grounds. The pursuer alleged, *inter alia*, that the oversman had made an inspection of the coal, upon which he gave his decision, without sending any notice to the pursuer to attend, although he was attended by the defender, who took that opportunity of making misrepresentations to the oversman, under the influence of which the oversman had pronounced his award. The pursuer further alleged that the oversman had made no *bona fide* or effectual inspection of the coal. On these points the Court allowed two issues to be taken for trial by jury—"1st, Whether the award was procured by the defender, through undue communication with the oversman, and misrepresentations made to him?" "2d, Whether the said oversman wrongfully pronounced the said award, without examination of the coal therein referred to?"[2]

[1] In an arbitration respecting the marches of certain lands, the submission devolved on an oversman, who made an inspection of the ground, attended by one of the parties, but in the absence of the other, to whom no due notice had been given. He was also attended by one of the arbiters, who was the nominee of the party in attendance. The other arbiter was dead. The oversman gave forth an award, which proceeded on this inspection. The award was reduced by the absent party, the Court unanimously holding that the oversman had acted in violation of his duty, and that "the whole proceeding at the inspection was inconsistent with the fair course of an arbitration," and "contrary to the principles of fair justice between man and man."—E. of Dunmore, Jan. 28, 1835, 13 S. 356.

[2] L. Pres. M'Neill observed: "If it be the fact that the oversman did not fully examine the coal, or made no examination at all, then he did not do honestly the duty devolved on him. If he was led to an erroneous conclusion by an *ex parte* communication, that is a good ground for setting aside this award; and I think the

282. It has been held, in one case, in which the conduct of a chemical experiment was regarded, in the circumstances, as tantamount to the proof which was led in the case, that an oversman, who allowed himself to be attended by one of the parties in making the experiment, without having given notice to the other party to attend, committed an error which was fatal to his award. It was held, that if the arbiter allowed either party to attend, he was bound to have allowed both to do so; and that, otherwise, he was not acting with even-handed and equal procedure to both parties alike.[1]

party would be entitled to an issue on that point. I do not know that one of the parties being present, and the other not, would be a good ground for setting it aside; but it is for a jury to consider that. If one of the parties took possession of an oversman, and carried him to the coal-field, without the other being present, that is a very pregnant circumstance, and the jury will draw their inference. I do not say that was the case here; but I can suppose such a case for the sake of illustration. In such a case, it is not necessary that the party should remember the very words that passed; but if it could be made out that the arbiters themselves had inspected the coal the day before, and were of opinion that the coal was worth not one-half of what it was valued at by the oversman, and that the parties went with him, and that he never looked at the coal at all, and then put a value upon it, that would be a pregnant circumstance; and still more so, if the oversman himself admitted that he had never seen the coal. And, therefore, I cannot withhold from the parties an issue that would involve these matters." The other Judges concurred in granting the issues above quoted.—MacNair, Feb. 16, 1855, 17 D. 449.

[1] Heggie and Co., dyers, were at issue with their employers, whether certain yarns had been dyed by them "with indigo or not." In a submission, it was expressly stipulated, that the employers should be "bound to instruct to the satisfaction of the arbiters, that the yarns, to be by them submitted to the said arbiters for their inspection, are the identical yarns which have been dyed by Heggie and Co." The arbiters differed, and chose an oversman. He was a practical dyer, and he applied a chemical test to the yarns which were shown to him, and decided, upon that experiment, against Heggie and Co. Heggie and Co. were not present at the making of the experiment, but the other party was. No evidence was adduced of the identity of the yarns.

In a reduction, Heggie and Co. insisted on their right to have been present at the making of the experiment (which was equivalent to the leading of the proof on which the case was decided), so that they might both have called for proof of the identity of the yarns; and might also have had the opportunity of directing the oversman's attention to the quality and genuineness of the substance used by him as a test, in making the experiment; and also to the most accurate mode of conducting the experiment.

The Court unanimously held that there were several "fundamental defects in the substance and essence of the decree-arbitral: 1. There was no evidence produced of the identity of the yarn, and, as one of the parties was not present, the arbiters must have relied on the assertion of the other party, which they were not entitled to do. 2. Although it may not be necessary that the parties should have been allowed to plead before the arbiters, yet it is essential that they should have been present at the experiment for the examination of the yarn; but it is admitted the pursuers were not present at that made by the oversman, etc."—Heggie and Co., Feb. 1, 1825, 3 S. 339.

[See also Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271, a somewhat similar case to the above, where, however, the decree-arbitral was sustained.]

283. The contract of submission may, and sometimes does, impose express limits upon the arbiter with respect to the leading of proof, or with respect to the party on whom the *onus* of proof shall be laid. In these cases, as the arbiter derives his power solely from the contract, it is *ultra vires* of him, and will expose his award to fatal challenge, if he acts in breach of the stipulations of the contract.[1]

284. Arbiters have occasionally taken evidence in the absence of both parties. This error is not necessarily of so fatal a character as that of taking evidence in the presence of one party, and in the absence of the other. But it is nevertheless very unsafe, besides being most inexpedient. It will rarely happen that the whole facts of importance can be elicited from witnesses without the aid of the parties, who thoroughly know their own case, and their witnesses; and who generally possess the interest (on one side or other) to elicit from them all that they know. The practice of examining witnesses "behind the backs of the parties" (as it has been called), ought to be most carefully avoided.[2]

285. Where an arbiter has committed an irregularity in leading a proof—as, for example, by examining witnesses outwith the presence of both parties—it is competent to either party to waive his right of objecting to such irregularity, if he thinks fit; and he may so waive it, either by writing, or by his actings and conduct in the submission,[3] after he has become fully aware of what has taken place.

286. It appears from the Session papers in the case of Kirkaldy, that the oversman, who led a pretty long parol proof, expressly refused the request of one of the parties to allow the law-agents to be present at the examination of the witnesses; stating that he considered he could thereby beneficially abridge the procedure. He also refused the request of the same party, that he would appoint a clerk to the submission, to take down the proof. He intimated in writing to the parties, that they themselves might be present at the examination of the witnesses; "the parties suggesting what questions they think proper to the oversman, who will put them to the witnesses if he shall judge them relevant, and take down the evidence himself." After a proof was thus led, the oversman pronounced an award. A reduction was strenuously urged on various grounds, and the above

[1] Halley, July 9, 1833, 11 S. 942; Heggie and Co., Feb. 1, 1825, 3 S. 339.

[2] The dangers which are attendant on such a course of procedure will be found strongly animadverted on by L. Cranworth in Drew, 8 Mar. 1855, 2 Macq. 8. See, at the same time, Barr, Nov. 18, 1852, 15 D. 21, in which an award was sustained, although the arbiter had examined some witnesses in the absence of both parties; and had also given notice to one of the parties of the time when an examination of one of the witnesses was to take place, and no notice to the other party. But the party who had received the notice did not attend. The whole procedure of the arbiter was perfectly open, and nothing unfair had been intended.

[3] Drew, Mar. 8, 1855, 2 Macq. 10.

facts, *inter alia*, were strongly pressed on the attention of the Court; but the award was sustained.[1] The matter submitted was the valuation of farm-stocking, etc., to a large amount.

287. It is a question of considerable practical importance, which has occasionally been mooted, whether it is competent for an arbiter, in taking a proof, to do so by means of a commissioner, in place of taking it himself, where no express power to take proof on commission is contained in the submission. It is objected, that the taking of proof is an official function of great importance; and that the parties, in submitting to a particular arbiter, might have specially had in view his personal fitness to discharge that duty, and might have declined to submit at all, if the power of leading proof was to be exercised by some person who was not known to them, and in selecting whom they had no control. It is answered, that there are many aids, in the performance of his duty, which an arbiter, in the exercise of his discretion, may legitimately take, without any express power being given to that effect. He may, for example, when the circumstances require it, remit to a man of skill to report;[2] and it is no delegation of his office to use that report as a means of instructing his own mind. In like manner, where he finds it inconvenient to give so much of his own time as the leading of a proof requires, he may remit to a qualified person to take the proof, and report the evidence to him. He does not thereby delegate his own office to another; because his commissioner acts, in all respects, under his control, and if he either admits or rejects evidence contrary to the arbiter's opinion, the arbiter will rectify this, upon appeal to him.

288. Apart from decisions, the question is one respecting which views of weight may be urged on opposite sides. But there appears to be at least one case in which the point was expressly raised, and, after being strenuously argued, was decided by the Court in favour of the arbiter's implied power to take proof by commission. It was so decided, first in a suspension, and afterwards in a process of reduction, relative to the same award.[3]

[1] Kirkaldy, June 16, 1809, F. C. See Information for Kirkaldy, p. 16.

[2] Caled. Ry. Co., Mar. 23, 1860; Appeal Cases in 22 D. 8; see also 32 Scot. Jur. 472, L. Wensleydale's observations.

[3] Berry, Dec. 15, 1827, 6 S. 256; and Jan. 26, 1831, 9 S. 337; and Sess. Pap. In this case, the submission contained no clause at all empowering the arbiter to lead proof. A separate reason of reduction was therefore urged, to the effect that it was *ultra vires* to allow proof; but the Court repelled this.—*Supra*, sec. 258.

The fourth reason of reduction was, that the deposition of the witness who had been examined was "taken in Glasgow, where all parties resided, not by or in presence of the arbiter, but by his clerk, to whom he had no power to delegate the duty of examination of witnesses."

On this subject, L. Moncreiff, in the note to his interlocutor reporting the case in the reduction, observed (after adverting to the larger question of the arbiter's power to lead proof at all): "The L. Ordinary thinks there is nothing in the objec-

289. There is a reported case of last century, which seems to indicate decidedly, that, according to the state of practice at that time, and the understanding of the Court, there was a general power in an arbiter to grant a commission for leading proof in any case in which the witnesses resided in a different county from that in which he himself resided. If such a general power, however, existed, it would seem necessarily to infer the power of granting a commission in all circumstances in which the arbiter, in the exercise of a reasonable discretion, saw fit to do so. And the case of Berry is, in any view of it, an authority to that extent. But if this much be clear, it may be difficult to draw any line circumscribing an arbiter's right to use this power, more than any other of his well-known powers, in the leading of a proof under a submission.[1]

290. Where witnesses reside in another kingdom, it does not appear ever to have been doubted that a power existed in the arbiter to grant commission for their examination, in place of himself going abroad to take it. It is obvious that, in the ordinary case, the duty of an arbitration is undertaken by an arbiter as one which is incidental merely, and subordinate to the main business and occupation of his life. It must, therefore, be according to the full understanding of all concerned,—a matter as completely agreed to by implication, as it could be by express words,—that the arbiter is not himself to quit the country, and relinquish all other business, in order to examine witnesses who reside abroad. In other words, it must be held as tacitly agreed to by all concerned, that he may take such proof on commission. Accordingly, in a case where no special power to take proof on commission was given, and where a commission was granted to

tion to the mode of taking the proof, if there was power to take it." The Court, though their opinions have not been given, must have concurred with his Lordship in this view, as they repelled the reasons of reduction, and sustained the award.

It is proper, at the same time, to notice that the defender, besides insisting on the arbiter's general power, also explained to the Court, that there were special circumstances which justified him in granting a commission in this particular case. The arbiter himself was at the time unwell, and the witness was about to leave the country. But though these might be important circumstances, to show (for the personal credit of the arbiter with the Court) that he had not acted either capriciously or indolently in granting the commission, yet it would scarcely appear that they could have cured a radical want of power, had such existed. It would rather appear, therefore, that the case is an authority to the effect that an arbiter has an implied power to take proof on commission.

[1] Gordon, July 16, 1741 (634). Kilkerran reports that the Court do not grant warrant to cite witnesses "from a different shire" to appear before an arbiter. As to such witnesses, the Court grant warrant to cite them "to appear before any commissioner to be named by the arbiters, and that within the shire in which the witnesses live; and in these terms granted diligence in this case." [See also Caird, June 1, 1865, 3 Macph. 851; Highland Rail. Co. *v.* Mitchell, May 30, 1868, 6 Macph. 896.]

examine witnesses in England, which was strenuously resisted on other grounds, no plea was urged on the radical want of power in the arbiter to take proof on commission.[1]

291. Even in regard to witnesses who live in the neighbourhood of the commissioner, the Session papers of reported cases show that it is not an unfrequent practice for the arbiter to grant commission to take the whole or part of a proof. This seems to take place when he either finds that the other demands upon his time render it highly inconvenient to himself to take the proof, or that such a course would perhaps involve so great a delay as to cause the risk of losing evidence, or of occasioning some other injury to the parties.[2] At the same time, it may often happen that parties are unwilling to resist an arbiter, who, in a pending submission, explains that it would put him to personal inconvenience to take the proof otherwise than on commission. And if they once acquiesce in the proof being so taken, they cannot afterwards object. It would be unsafe, therefore, to rest upon such instances, as of themselves sufficient to instruct the general right of the arbiter to take proof on commission whenever he thinks fit. Perhaps it would, on the whole, be prudent to state expressly in the submission, whether an arbiter is, or is not, to have power to lead proof on commission; at least until the Court shall have had the opportunity of deciding the pure point of an arbiter's power to grant commission at his own discretion.[3]

292. Before leaving this subject, it is scarcely necessary to observe, that there are few steps of procedure in a submission which require more close attention than that of seeing that both parties have received due notice of every diet of proof; and that both parties, alike, obtain impartially from the arbiter, the same equal facility of informing his mind, by fully adducing their respective proof before him. It is generally desirable, even at the occasional sacrifice of some valuable time, to allow a somewhat ample scope to parties in leading their proof: as in this way the arbiter is most likely to attain the very important end (which is as desirable in private as in public tribunals) of giving to the losing party every feeling of satisfaction which is compatible with the loss of his cause, and of avoiding to embitter his feelings with the suspicion, that such a result had arisen from some precipitancy of procedure, and the consequently imperfect state of information of the arbiter's mind.

[1] Blaikies, July 8, 1851, 13 D. 1307; and Session Papers.

[2] See, for instance, Session Papers, in Mitchell, June 17, 1848, 10 D. 1297.

[3] It may be noticed, as indicative of the state of practice at the time, that Russell, in his "Theory of Conveyancing" (p. 115), considered this to be a prudent precaution then.

CHAPTER IV.

ARBITERS' POWERS AND DUTIES IN REGARD TO THE HEARING OF PARTIES.

293. THE object of a hearing is to supply one important means of informing the arbiter's mind upon the nature of the questions in dispute, by laying before him the opposing statements and arguments of the respective parties, so as to assist him in making up his own judgment upon the case. The extent to which an arbiter ought to hear parties for this purpose, in each respective submission, may vary indefinitely, according to the circumstances of the particular case. But while, in most submissions, a hearing is indispensable, in almost all it will afford most valuable assistance to an arbiter, besides conducing to the satisfaction of the parties who have confided their rights and interests to his disposal. The keen stimulus of self-interest sharpens the observation of the party in a cause, and enables him to perceive, and to bring before the arbiter, all the facts and arguments which favour his own claim, or show the weak points of his opponent. And the frank collision of earnest discussion between antagonists has the effect of letting in light upon many bearings of both sides of a cause, which might escape the calm scrutiny even of an acute and intelligent person, who, like the arbiter, stands free of the promptings of self-interest on either side, and is thoroughly indifferent between the parties and their claims.

294. So important an aid is the hearing of parties to an arbiter in the performance of his functions, and so nearly is it essential in all procedure which, like arbitration, is of a judicial character, that it is seldom prudent for an arbiter, without the consent of the parties, to dispense with it altogether. Perhaps it is not too much to say, that in every instance in which an award is challenged, on the formidable ground of no-hearing, the *onus* will lie on the party defending the award, to show that the circumstances of the submission were such as to warrant the arbiter in deciding without first hearing the parties. But the gravity of that *onus* will, of course, vary greatly, according to the nature of the matter in dispute.

295. As the object of allowing the parties a hearing is one and the same with that of allowing them a proof—viz., to inform the arbiter's mind—the rules which demarcate an arbiter's duty, and consequently his powers in both of these departments, have a great affinity to each other. Nearly all the decisions and judicial opinions which throw light upon one of these departments of arbitration law, are therefore instructive also upon the other.

296. After the arbiter, either by making up a record, or in some other way, has brought distinctly before him the subject-matter in issue, and the averments of parties *hinc inde;* and after the proof, so far as allowed, has been concluded; the proper time for hearing parties on the whole cause has arrived. Such hearing may be either *vivâ voce* or in written pleadings, or in both forms, at the arbiter's discretion. It may be either by the parties themselves, or by their counsel or agents. Whether more than one hearing, and if so, how many hearings should be allowed, must of course depend upon the circumstances of each respective case; but after allowing one hearing, the arbiter possesses the very largest discretion as to the extent of further hearing (if any), which he will either permit or enjoin.[1]

297. It appears to be within the discretion of the arbiter, at least to a very large extent, to say whether he will allow parties to be heard before him, by their counsel or agents, or whether he will require them to state their own case, *vivâ voce,* in his presence.[2] There are many submissions, however, in which, from the points of law which are involved, or the complicated nature of the facts, it is so evident that the assistance of professional men is advisable, that no intelligent arbiter, sincerely desirous to do his duty, will hesitate to allow it. And, in general, where parties themselves wish to have that assistance,

[1] "If the arbiter fairly heard the parties after the proof, it belonged to his discretion whether he saw cause to hear more. It is not a necessary allowance to the course of 'eternal justice,' to hear interminably."—Per L. Moncreiff, in Brakenrig, Dec. 17, 1841, 4 D. 286.

"A party, no doubt, is entitled to be heard before a referee, both on the proof of the facts and the law of the case; but he cannot be entitled to prescribe to the arbiter how often this shall be."—Per L. Medwyn, *ibid.* See also L. J. Clerk Hope's opinion, *ibid.* See Anderson, Feb. 27, 1850, 12 D. 782.

It may be remarked, that where the parties themselves have been heard before the arbiters,—where no allegation is made that there was unfairness at the hearing,—and where no record of the hearing has been preserved, it is difficult to imagine how either party could afterwards reduce the award on the ground of the arbiter's having refused to allow him a further hearing. Because he would always be open to the observation, which weighed so much with the Court in the remarkable case of Mowbray (*infra*), that at the oral hearing he might have made statements which admitted himself out of Court, and presumably he had done so.

[2] In the important case of Mowbray, June 2, 1848, 10 D. 1102, the arbiters, after claims had been lodged on both sides, appointed parties to attend them without being accompanied by either counsel or agents. Thereafter, and without allowing any proof or further hearing, they proceeded to decide the case, notwithstanding the urgent remonstrances of one of the parties. The award was keenly challenged on other grounds, but apparently without its being thought maintainable that the arbiters had acted *ultra vires,* in appointing the only *vivâ voce* hearing in the case, to be by the parties themselves without any professional aid. The award was sustained. The case arose out of a mercantile transaction between the parties, and the arbiters were mercantile men. See also *supra,* sec. 286, the case of Kirkaldy, in which an arbiter refused to allow the law-agents of the parties to be present when a parol proof was led.

an arbiter should have no inclination to refuse it. He will often thereby save time, trouble, and expense to all concerned.

298. At the same time, there are not a few cases in which an arbiter may well feel satisfied, on considering their complexion, that, by merely examining the parties in his own presence, and apart from all professional aid, he will get most directly at the facts of the case (as often happens in the procedure of the Small Debt Court), and will thus be enabled to give a just judgment, while he also greatly abridges the duration of the submission. If an arbiter has been judiciously selected by the parties, he will exercise a sound discrimination between the different classes of cases, in deciding on the form of procedure which should be followed by him in hearing the parties. But even if he erred, in point of discretion, in refusing to hear a party by his counsel or agent, his powers on this subject appear to be so large, that it is difficult to say, by anticipation, under what circumstances his error could be so great as to invalidate his award. The circumstances would require to amount at least to this, that though a hearing had been allowed in form, it had been denied in substance, by the course which the arbiter had pursued.

299. As the object of allowing a hearing is to inform the arbiter's mind, it follows that, whenever an arbiter is so placed that, without any hearing of parties, he can conscientiously and rationally consider himself to be sufficiently informed on the merits of the case, he may proceed to give his award if he thinks fit, without allowing any hearing to take place. His power in this respect appears to be analogous to that which has been already considered,[1] of disposing of some cases on the strength of his own information, without either requiring or allowing a proof.

300. This power of dispensing with hearing may sometimes be exercised, for example, in those cases in which an arbiter has been selected as a man of skill and experience touching the matter in dispute; and where the mere personal inspection of premises, etc., will exhibit to his eye the most patent and satisfactory information. But even in this class of cases, a conscientious arbiter will not too hastily assume that valuable matter may not be brought under his notice by the parties, if in attendance on him at the inspection, and allowed there to make any explanations which can best be made upon the spot; or that important views may not be suggested to his mind by the parties, at a subsequent hearing; all which might have escaped his own unaided observation, if he had inspected the premises alone, and had thereafter decided, without allowing any opportunity for a hearing.

301. In a recent case, where the oversman was a coalmaster, selected for his personal knowledge and experience, and the subject

[1] *Supra*, sec. 264 *et seq.*

in dispute was the value of a quantity of coals, as left by an outgoing tenant upon the hill, which the oversman went to inspect before making his award, the Court indicated an opinion, that the total want of the hearing parties would not be fatal to his award, provided that he had himself made due personal inspection of the coal.[1]

302. In like manner, the plea of want of hearing was repelled in a case where punctilious procedure was not to be expected, and in which the oversman who pronounced the award was a practical farmer and neighbour, called in for his personal skill and experience, to determine a question under a lease, as to the state of repair of some houses and fences, and as to the valuation of a field of turnips. He had considered reports by the arbiters, stating their respective opinions, and had thereafter himself inspected the subjects before giving his award. A reduction was brought, on the ground that there had been no hearing of parties before the oversman. The L. Ordinary, Cuninghame, and the Court, unanimously sustained the award.

303. L. Jeffrey.—"As to the mode in which the proceedings were carried on, it will not be overlooked, that this was a reference to neighbours, who themselves possessed the same kind of houses and fences, and who were called in to inspect and report. There was at least a hearing, or partial hearing, before the arbiters. No complaint was made of want of hearing to the oversman, although there was a

[1] MacNair, Feb. 16, 1855, 17 D. 445. L. Pres. M'Neill, after observing that there was no general rule for dispensing with hearing in cases of valuation, and narrating the circumstances of the cause under discussion, proceeded—"That brings the case to this—is this a case of that kind, in which the parties need not be heard? Now, if the reduction had rested on the point, that the party had not been heard, I could not sustain that reason of reduction at all." "The coal is already divided into proper coal and dross, and the oversman inspects it; and if he inspects it properly and thoroughly, and without being prejudiced by anything that has been said or done, I think that his opinion is conclusive on the subject." It is proper to add, however, that his Lordship further considered, that the parties had, by their conduct, indicated "a departure from any desire to be heard."

L. Ivory, in "the very special circumstances of the case," concurred. His Lordship observed, *inter alia*—"Having regard to the particular subject, and to the particular situation of the subject, as elements to which the arbiters are only to add a price, I cannot say, either that this is a case in which the parties are entitled to be heard, nor can I lay it down as a general rule, that, in all cases of this nature, parties are entitled to be heard." "As to the abstract matter of hearing parties, it is unnecessary to go beyond the case of Macgregor."—May 20, 1847, 9 D. 1056. (*Infra*, sec. 302.)

L. Deas.—"In most cases, parties ought to be heard; and there may be cases of valuation in which this is necessary. But here, the subject valued was a quantity of coal, for judging of which, nothing was requisite but inspection of the quality, and knowledge of the current prices. The arbiters and oversman were coalmasters in the district, selected as men of skill, and familiar, no doubt, with the prices, for the reverse is not alleged," etc. His Lordship concurred with the L. President and L. Ivory.

L. Curriehill was not present.

considerable interval between the issuing of his award, and the devolution to him. He had their reports before him, and made inspection himself. What more is necessary? It would be against all justice, therefore, to give any encouragement to the pleas of the pursuer." The other Judges concurred;[1] L. President Boyle observing, that, in references of that class, the same strictness of procedure was not to be expected, which was requisite under more formal submissions.

304. So, also, a plea of want of hearing was repelled in a case where the Keeper of the City Meadows of Edinburgh had been selected, as a man of skill, to be sole arbiter in valuing the damage done to certain grass parks, by a prize-competition which was held there, and which attracted a large concourse of spectators during three successive days. The arbiter, in a few days after the competition, issued notes, intimating that he had carefully examined the state of the pasture, both before and after, and also during the competition; that he had taken into account the state of the weather on each day, and other circumstances, which indicated careful attention on his part to the subject; and that he was of opinion, the sum to be awarded as damages was a certain specified sum, composed of several specified items. These notes were intimated to the parties. After repeated applications for payment, the tenant of the grass parks moved the arbiter to issue his award, which was done accordingly. Action for payment was then raised on the award, against which it was pleaded in defence, that the award was inept, as no hearing had been allowed to the parties; but the Court repelled the plea, chiefly in respect that, from the nature of the subject to be valued, and the selection of the arbiter for his personal skill and experience, it was fairly to be inferred that his own inspection of the ground supplied him with sufficient information to warrant him in pronouncing his award without having heard parties. Some of the Judges also adverted to the fact, that the pursuer of the reduction had enjoyed full opportunity to apply for a hearing after the arbiter's notes were issued, and before the execution of a formal award, but had not availed himself of it.[2]

[1] Macgregor, May 20, 1847, 9 D. 1056.

[2] While the Court held that the award, in the special circumstances, was not liable to reduction, they were not understood to approve of an arbiter, in almost any case whatever, refraining from affording to the parties an opportunity of being heard before him, if they should desire it. L. Cowan, Ordinary, observed in a note, that "there is no question of the relevancy of the ground of challenge pleaded by the defender: wherever it appears to have been indispensable for the just discharge of a referee or arbiter's duty, that he hear parties or receive evidence, before issuing his award, his not doing so must have the effect of invalidating his decreet. But then, there may be submissions of such a character as clearly to contemplate the matter of them being adjudicated upon without the observance of these forms, which would be held indispensable in submissions of a different character; and of this an illustration is found in Macgregor, May 20, 1847." (*Supra*, sec. 302.)

His Lordship intimated that he "considers this case falls within the operation

305. But the right of a party to state his case to his judge, and the corresponding duty of the judge to hear the party before making up his mind, are universally recognised in all judicial procedure as the most important means of enabling a judge to decide justly; and as this arises from circumstances which are not peculiar to public tribunals, but which, on the contrary, are applicable alike to all men who exercise judicial functions, whether in a public or private character, it is comparatively seldom that an arbiter will act safely in refusing all hearing to parties who apply for it, or even in proceeding to pronounce an award, without affording the parties an express opportunity of being heard, though they may not have asked a hearing. An arbiter can never, conscientiously and rationally, believe himself to be in a fit state to pronounce a just award, without hearing the parties, unless he holds that his mind is so well informed and so ripely advised on the matters in dispute, without such hearing, that the hearing could afford him no material aid in these respects. When the arbiter is well founded in so holding (as in the cases of Macgregor and Latta just noticed), the Court will sustain his award, though he has not allowed a hearing to the parties. But where the arbiter cannot conscientiously or rationally regard himself as duly prepared to pronounce his award without hearing parties, and nevertheless proceeds to do so, the Court will reduce the award on the well-known ground of no-hearing. Because in such a case, by depriving the parties of their natural right to be heard by their judge, he has committed a violation of the duty which he owed to them under the submission, and an act of positive misconduct as an arbiter. Wherever this occurs, the award is open to reduction, either on the ground that such conduct by an arbiter amounts to "corruption," in the constructive sense which has been applied to it as used in the Regulations 1695; or because it involves a breach of the obligations which, at common law, he undertook to perform towards the parties, under the contract of submission.

306. Accordingly, although no hearing may have been asked by the parties, still, if it has not been actually waived by them, and if it be evident that an arbiter's mind could not possess the information which was essential to enable him conscientiously to decide without affording parties an opportunity to be heard; then, if he decides without hearing the parties, his award will be liable to be set aside.[1]

of the principle, acted on by the Court, in Macgregor." On a reclaiming note, the Court (*diss.* L. Cockburn) adhered.—Latta, Mar. 9, 1852, 14 D. 641. [See also Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271; Mackenzie *v.* Visct. Hill and Tennant, June 2, 1868, 40 Jur. 499.]

[1] Langmuir, May 21, 1840, 2 D. 877.

A claim of £157, the balance of an alleged account for medical attendance on a party deceased, was submitted to two physicians as arbiters. An action had been previously raised for payment, in which a record was made up; and this was spe-

307. Where an award was brought under reduction, in circumstances in which an alleged want of hearing was held to be a relevant ground of challenge, the pursuer proposed the following issue for trial: "Whether the said oversman wrongfully pronounced the decree-arbitral, without hearing the parties in the matter submitted?" The defender contended, in respect of the Regulations 1695, that the word "corruptly" should be substituted for the word "wrongfully." But the L. Ordinary, Moncreiff, approved of the issue as proposed by the pursuer, and the Court adhered.[1]

cially noticed in the submission. The endurance of the submission was limited to three months. The "number" of visits in the account was admitted; but the "necessity for such a number and frequency of visits" was denied, with reference to the patient's condition. And the arbiters were "to consider the justness and reasonableness of the charges."

The arbiters did not look at the record in the action, nor did they lead any proof, or afford the parties an opportunity of being heard; but, on the day before the expiry of the submission, they gave an award for £145, 15s. 6d., on the narrative that they had "minutely examined and investigated the account, and considered the justness and reasonableness thereof, which is all that is submitted to us," etc. The parties had not applied to the arbiters for a hearing, but neither had they waived their right to be heard.

In a suspension of a charge upon the award, it was admitted that there had been no hearing.

The suspender contended that it was impossible, in the nature of things, for the arbiters, without hearing parties, to have their minds informed, so as to give a conscientious judgment for any one sum rather than another, by merely looking at the account rendered. Nor had the parties ever departed from their right to be heard.

The charger answered, that no hearing had been asked, and that the arbiters, being themselves medical men, and having carefully examined the details of the account, in which the "number" of visits was admitted, were entitled to give their award on the justness and reasonableness of the account. And the award being given, it was protected by the 25th Article of the Regulations 1695, which it did not in any respect contravene, as the arbiters had not been guilty of either falsehood, bribery, or corruption.

The L. Ordinary, Cockburn, suspended the charge; and the Court unanimously adhered.

L. Cockburn observed in a note, as to the defence that the suspender had not asked to be heard: "That can never be sustained. A party may have little to say, or nothing of value, but it is he who is to judge of this; and therefore no arbiter, and no Judge, can proceed safely, unless he give him an opportunity of stating his case." "According to the principle of the charger, an arbiter might accept of a submission, and then do nothing till the day before it expired, when, seeing that nobody moved, he might decide. It is plain that a great deal might have been urged and attempted to be proved here, particularly in reference to the necessity of the visits and their nature. But the arbiters were so easily satisfied, that, though the submission contains an express reference to the process, it (as the L. Ordinary understands) was never out of the hands of the Clerk of this Court. It would be most dangerous to sanction such indifference to the rights of parties, and to the duties of arbiters."

On a reclaiming note, the Court unanimously adhered.

[1] Macphersons, June 23, 1831, 9 S. 797. See also 3d Issue in E. of Hopetoun, Mar. 19, 1859, 21 D. 782.

308. After parties had been heard by an arbiter, though without the intervention of counsel, the arbiter is not bound to delay going on with the submission, or to postpone a meeting for further hearing, on the motion of one of the parties, who states that he desires to be guided by counsel as to his further procedure, and that he is incidentally deprived, for a short time, of the opportunity of obtaining that advice. Even if the party shall intimate his resolution to make no further appearance in the submission until he shall have obtained counsel's advice, the arbiter may proceed with the submission, and pronounce his award. Although the party in question may not have again appeared in the submission, the award will not be open to challenge upon that account.[1]

309. Though an arbiter may sometimes dispense with a hearing altogether, as has been already noticed, yet, wherever he does allow a hearing to one party, he is bound equally to allow it to the other; unless, indeed, in the unusual case of his being prepared to decide wholly against the party, whom alone he has heard, upon his own statement. On this subject the arbiter possesses no discretion whatever; and if he violates the rule of even-handed impartiality, which enjoins the hearing of both parties alike, his award may be reduced by the party who was excluded from being heard.[2]

310. Parties, however, may become personally barred from objecting that they had not been heard. Thus, if a party who has received due notice to attend, simply declines to attend at a hearing, or sends an insufficient excuse for non-attendance, he cannot afterwards be allowed to object that the arbiter heard the other party only, and not also him. Because a party has no right, by merely refusing to perform his own duty of attendance, either to prevent the arbiter from going on with the business of the submission, if he sees fit

[1] "There is no particular form of procedure stipulated in the submission, and the objection is founded only on the general obligation to hear parties." "It is quite out of the question, that a party should say to an arbiter, You must stop till I consult counsel. The matter had been already discussed in the ordinary way, and the oversman was entitled to give decree." Per. L. Glenlee (the other Judges concurring), in Spearman, etc., Feb. 28, 1828, 6 S. 645.

[2] "It was impossible that an award could stand, where the arbiter heard one party and refused to hear the other."—Per L. Eldon, C., in Sharpe, Feb. 24, 1815, 3 Dow 102.

"Most unquestionably, if he hears one party, he cannot refuse to hear the other."—Per L. Fullerton, in Mitchell, June 17, 1848, 10 D. 1308.

"There is now no doubt that if the arbiter should decide, upon hearing one of the parties, and not the other; or should proceed upon the evidence adduced by either party, without seeing or hearing the counter-evidence of the other party; such partiality, although it may have proceeded from inadvertency, or mistaken views of duty, would be held to be 'corruption,' in the sense of the Regulations." —Per L. Curriehill, in Millar, Mar. 10, 1855, 17 D. 728.

[See also Campbell *v.* M'Holm, Dec. 11, 1863, 2 Macph. 271.]

to do so, or to deprive the opposite party of the power of stating his case to the arbiter. The wilful absentee has had full opportunity to vindicate his own interests, if he pleased, and he has no right to more.[1]

311. Parties may also waive their right to a hearing, either expressly, as by lodging a minute to that effect, or impliedly, by their actings and behaviour. Wherever a party does so, it would be equally unjust to his opponent and to the arbiter, if the party were allowed afterwards to raise any objection to the award on the ground of his not having been heard.[2]

312. An arbiter is not bound to issue either notes of his opinion, or a draft of his award to the parties, before he gives forth his award.[3] But the issuing of such notes, or such draft, is, in most cases, a course which it is highly advisable to follow, both for the satisfaction of the parties, and as a means of guarding against the risk of accidental oversight of any of the points embraced by the submission. It is common for an arbiter, in the exercise of his discretion, to allow the parties, on their application, to be heard before him, upon the views contained in his notes; especially when any of these views are new, and have not already been fully discussed by the parties.

[1] It is always desirable, however, to avoid giving any occasion or colour for the plea of non-hearing. It was only by a majority, that the Court sustained an award against such a plea, in the following circumstances:—There was a submission for valuing lands which had been excambed. In a reduction of the oversman's award, it was stated, besides other reasons, that the oversman had refused to hear the pursuer, and had made his inspection of the ground, at the sight of a party acting for the defender, and outwith the pursuer's presence. A proof was allowed, in the course of which the oversman was examined. It appeared that, before making the inspection, notice had been given to the pursuer, but he declined to attend; that a minor son of the other party had attended; and that the pursuer, before the inspection, had exhibited to the oversman a paper containing a full statement of his views, which the oversman had read. The Court, on these facts, adhered to the L. Ordinary's interlocutor, and repelled the pleas in question; L. Pres. Boyle dissenting, however, in respect that he thought "the party had not been sufficiently heard."—Macdonald, Dec. 8, 1843, 6 D. 186. See also Paterson, May 15, 1829, 7 S. 616. Spearman, etc., Feb. 28, 1828, 6 S. 645.

[2] In the case of MacNair, Feb. 16, 1855, 17 D. 445, L. President M'Neill intimated an opinion that the procedure of the parties "was clearly a departure from any desire to be heard." The other Judges are not reported to have spoken expressly to this separate point.

In an analogous question—viz., a party's waiver of his right to object to an examination of witnesses, which had been made in his absence—see observations by L. Cranworth, C., in Drew, Mar. 8, 1855, 2 Macq. 1.

[3] Johnston, July 10, 1817, 5 Dow, 247; MacCallum, May 23, 1826, 2 W. & S. 344; Baxter, Feb. 20, 1836, 14 S. 549. In this last case, the Court intimated their strong approval of the practice of an arbiter's issuing notes of opinion, at the same time that they did not hold it obligatory on him to do so. It was a case of judicial reference, but the observations of the Court would equally apply to an ordinary submission.

CHAPTER V.

POWERS AND DUTIES OF ARBITER IN REGULATING PROCESS UNDER A SUBMISSION.

313. AFTER the subjects of proof and hearing, it remains to consider that of process. The term 'process' is used here in the sense already explained, as indicating that form of procedure, apart from proof or hearing, which is adopted for the purpose of bringing under the arbiter's view a distinct statement of the precise question at issue, including the mutual averments, admissions, denials, and explanations of the parties. An arbiter possesses large discretionary powers in regulating the form of procedure which shall be observed by the parties in the conduct of the submission before him.[1] In considering this subject, it may be convenient, in the first place, to give a brief outline of a form of process which, it is believed, is not unfrequently followed by arbiters in those submissions in which regular and systematic procedure is desired. It appears to be well adapted to the end in view, viz., that of accurately informing the mind of the arbiter as to the limits and contents of the submission, and the precise nature of the questions in dispute, at the same time that it compels an unreserved disclosure of the facts and pleas of the parties at the outset of the discussion. After having given this outline, it will remain to inquire what variations in the form of procedure may be ordered or allowed by the arbiter at his discretion.

314. It is usual that the arbiter, at the same time when he accepts his office, nominates a clerk to the submission, and also appoints mutual Claims[2] to be lodged by the respective parties within a certain short time. The best form of a Claim would seem to be that of a distinct narrative of the alleged facts, followed by a statement of the pleas in law, and having the conclusion or demand of the party subjoined. These papers, when lodged, are allowed to be seen *hinc inde;* after which, each party is appointed to revise his own Claim, and to subjoin answers to that of his opponent. If the arbiter, on perusing the mutual papers, thinks it expedient, he appoints a meeting, at which the parties are required to explain any of their statements which are obscure, to render precise any statements which are vague, and to meet each other's allegations directly and explicitly, where they may have previously omitted to do so. This being done, the arbiter then cer-

[1] It would appear that, in England, "the mode in which the reference is to be conducted depends entirely upon the arbitrator," subject, however, to review by the Court, if he does not act "fairly to each party."—Russ. 172, [4th ed., 161].

[2] Or Claim and Answers (with relative revisals), as the case may be. See forms of minute of acceptance, etc., in Appendix.

tiorates the parties (either by writing "Record closed," and signing his name below these words, or in some other form), that no new statement of fact can be afterwards brought forward by either of them, without first obtaining special leave from himself. Nor should such leave be too readily given; at least without providing that the party shall pay any extra expense which may have been occasioned to his opponent by his delay in making the statement in question, or without carefully observing that his opponent's case has sustained no substantial prejudice by the delay.

315. It is also desirable to enjoin the parties, before circumducing the term for making their respective statements, as above mentioned, to produce, *hinc inde*, all writings within their power, on which they mean to found. It may happen, that, in the course of a proof, writings are recovered and produced by one party which makes it necessary for his opponent to make a further production of writings, all or some of which were in his own power. This should not debar him from the right to produce them—even without being amenable in any expenses—if they be such productions as are necessary to meet the writings recovered and produced as above. But, with this exception, the after production of writings which had previously been in the party's power should not be allowed, unless on similar conditions to those on which a new statement is allowed to be brought forward, after the record has been closed, as mentioned in the preceding section.

316. The important object to be gained, by following this or some nearly similar course of procedure, is to compel both parties in the very outset, to lay a full and complete statement of the case, *hinc inde*, before the arbiter. Were it possible, by any method, to extort from litigants, while yet only on the threshold of the Court, a candid and unreserved disclosure of all the facts known to them, which related to the question at issue, the amount of time, labour, and expense which is now involved in judicial procedure would be thereby reduced, in most instances, to a comparatively small figure. It is for the purpose of approaching as nearly as possible to this result, that either the above form of process, or some similar procedure, is generally followed in the more important class of submissions, and that an analogous form of process is employed in Courts of justice.

317. When full statement and counter statement have been mutually made by the parties, together with the relative production of all documents within their power, the stage of procedure is reached at which an order for proof is generally made. But, before an arbiter gives any deliverance on this subject, it may often be expedient to afford the parties an opportunity, if they desire it, of being heard on the case as it stands. They may hope, on either side, to satisfy the arbiter, that enough is already proved or admitted, to enable him to decide the case. Or the effect of a hearing may at least be to limit

any allowance of proof which may require to be granted to certain specific points only, thereby saving both time and expense. But it is entirely within the discretion of the arbiter, on considering the record and productions, to decide whether he shall then allow a hearing, or, without any hearing, at this stage, shall allow a proof as to any disputed facts on either side. After proof has been fully led on both sides, the arbiter hears parties on the whole cause. He may allow or appoint repeated hearings, if he thinks proper.

318. But although the form of process which has just been sketched, is frequently followed in those more important submissions in which regular procedure is desired, an arbiter is not constrained, in any submission, to follow either that, or any other given course of procedure. He has a very large discretionary power in directing what course shall be followed by the parties in bringing before him a statement of the nature of the questions at issue in the submission.[1] And there are many cases in which the procedure above detailed would be quite inapplicable.

319. Many cases are so simple in themselves, that it would be cumbrous and useless to employ so much formality. In some submissions, again, the matter in dispute is so precisely stated in the contract of submission itself, that no separate written claim requires to be ordered from either party.[2] And it is in every case a matter for the arbiter's discretion, whether he shall appoint written claims to be lodged, or in what other form he shall enjoin the parties to lay the statement of their respective cases before him. In many submissions, it may happen that one oral hearing, whether of the parties themselves or of their agents or counsel, shall suffice to dispose of a case without written claims at all. If such a hearing sufficiently informs the arbiter's mind, to enable him intelligently and conscientiously to perform his duty and pronounce an award, it has served the whole purpose for which any procedure, of any kind, formal or informal, is resorted to before an arbiter. And in such cases, an arbiter of experience would therefore allow an oral hearing, and nothing beyond. In other cases, an inspection of premises by an arbiter who has been selected as a man of skill, and who is accompanied in his inspection by the parties, will often inform his mind so completely, that it would be a mere waste of time and money if he were to allow any after proof or pleading. And in these cases no after proof or pleading should be allowed. At the same time, those cases in which an inspection of premises takes

[1] In one case (of mercantile accounting), where an arbiter had been specially urged to order written claims to be lodged, and had refused to do so, this circumstance, *inter alia*, was pleaded against the award in a reduction. The Court sustained the award. The L. Ordinary, Robertson (2), observed in a note to his interlocutor: "There is no particular form of process before an arbiter."—Barr, Nov. 18, 1852, 15 D. 21.

[2] Ledingham, Dec. 16, 1859, 22 D. 245.

place are not necessarily of so simple a character as this. On the contrary, such cases may often require quite as careful and methodical a procedure for fully informing the arbiter's mind, and preparing him to give his award, as any other submissions whatever. And in such cases the arbiter ought to order a record to be made up, as the foundation of his after procedure.

320. In all the varieties of circumstances which give rise to submissions, an efficient arbiter will adapt the flexible form of process which is in his hands, so as to suit the particular case with which he has to deal. He will always keep in view, that in every question as to the precise form of procedure to be followed (as well as in regard to the extent of proof or hearing to be allowed), the sole object to be attained is that of duly informing his own mind regarding the subject-matter in dispute, so as to enable him faithfully to pronounce his award. An arbiter may be said to discharge his office more or less successfully, according as, in the circumstances, he succeeds in fully informing his mind, and thereby preparing himself to pronounce his award with the least delay and cost to the parties.

321. With respect to the limits of the arbiter's authority in deciding on the details of the precise course of procedure which he shall either direct or permit, the arbiter appears to possess the same large extent of general discretionary power with that which he enjoys in dealing with the questions of proof and hearing.[1] The extent of his power, in these two departments, has been already considered. But in point of general principle, the rules which govern an arbiter in dealing with the three great departments of proof, hearing, and process, appear to be the same. In respect to each of them, his duty is one and the same, viz., to render it subservient to the informing of his mind duly on the merits of the question in issue. In the department of process, therefore, he can pronounce no valid order directing procedure which is fundamentally incompatible with equal impartiality to both parties alike, or which is wholly irrelevant and impertinent as a means of investigating any matters in issue, or of informing his mind thereon. But, provided that he confines himself to any of the known

[1] "Determinations on the procedure by which the arbiter's knowledge of the merits is to be obtained, are, in the general case, within his competency. But in this last matter, there is this limit to his powers, viz., that he shall do strictly equal justice between the parties—that he shall not allow to the one that which he denies to the other. For the condition of the equal footing on which the parties stand, and of their equal rights to inform the arbiter's mind, seems to me a necessary implication in the whole transaction."—Per L. Fullerton, in Mitchell, June 17, 1848, 10 D. 1297.

In the same case, L. Jeffrey, after adverting to the very large and uncontrolled power which an arbiter possessed in dealing with the merits of a case, observed: "I am unable to recognise any clear line of demarcation between his control over the mode of procedure, and his powers on the merits of the cause. At all events, he has, in reference to the mode of procedure also, a very large province."

methods of procedure which are, or have been, reasonably recognised as adapted to the judicial investigation of truth—whether by ordering claims, or revised claims, from the parties; or the personal examination of the parties; or minutes by the parties, confessing or denying some matter *in facto proprio,* under pain of being held as confessed; or the production of documents which are within the power of the parties; or by appointing one or more inspections of premises, and so forth—it is difficult perhaps to state beforehand, any general limits which circumscribe the arbiter's powers, other than those above mentioned.

322. If an arbiter directs procedure which is neither incompatible with impartiality to the parties, nor irrelevant or impertinent to the inquiry before him, it is not easy to see on what ground the parties could lawfully refuse obedience to the order of their own arbiter. And in ordinary circumstances, few questions which trench on the limits of the arbiter's powers in the matter of process are likely to arise. If, however, an arbiter should strike out some entirely novel modes of procedure and investigation, never before employed in any reasonable method of judicial investigation, it may well be that his powers would be found to be misdirected and exceeded, so as to be of no force to bind the parties to obey them. But it would be unprofitable to speculate on the limits of the arbiter's powers under such circumstances, until some actual case may have occurred to raise the question in a practical shape. Apart from such extravagances by an arbiter, it may be generally stated, that it is his business to see that his mind is duly informed on the merits of the questions submitted to him; and he possesses the large province above indicated, in determining on the method of procedure which the parties shall follow in so informing his mind.

In the Appendix will be found a detailed statement of the ordinary steps of procedure which take place in the course of a formal submission, together with examples of some styles of minutes, etc., which are in common use.

CHAPTER VI.

POWER OF PROROGATION OF THE SUBMISSION.

323. An act of prorogation by an arbiter is that exercise of his jurisdiction by which, in virtue of powers conferred on him in the

contract of submission, he prolongs or enlarges the term of duration of the submission.[1]

324. Unless this act be timefully executed during the currency of a subsisting term (whether original or prorogated) of the submission, the submission falls by the mere elapse of time.[2] But where a submission forms part of another contract to which it is ancillary, no prorogation is requisite to keep it up. It then continues to subsist as part of a permanent contract.[3]

325. Arbiters cannot prorogate a submission, unless express power to that effect has been conferred upon them. But it is generally expedient to confer this power, because it is often impossible to foresee the length of time which may be found necessary by the arbiter, from various causes, for duly preparing himself to pronounce his award. And no conscientious arbiter will use the power of prorogation further than he finds to be necessary, in order to enable him adequately to discharge his office.

326. When parties have not conferred the power in the submission, and nevertheless find eventually that it is expedient to prolong the term of the submission, they can themselves prorogate it as often as they please. This is as entirely within their power, as it originally was to enter into the submission at first. But as such a prorogation, executed by the parties themselves, is substantially a new submission, it would seem advisable to execute it with the formalities of a probative writ. When executed on the same sheet with the submission, it has been held not to require a new stamp.[4]

327. Parties should not, however, rely upon this mode of prorogation. It frequently happens, in the progress of a submission, that the parties can perceive the tendency of the arbiter's views long before he is ready to give his final award. And, in these cases, it is more than probable that one of the parties will be desirous to let the submission fall, if he can; and will therefore decline to concur with the other party in prorogating the submission, should that become necessary to keep it up. Unless, therefore, the parties, at entering into the submission, think it so important to have an award within a given time, that it is better to be rid of the submission altogether, than to have it kept up beyond that time, it will generally be advisable to confer a power of prorogation upon the arbiters, who may be just as

[1] "The prorogating the submission is an act of jurisdiction, etc. By it the jurisdiction, which would otherwise expire, is prolonged."—Per L. Wood, in Langs, Nov. 23, 1852, 15 D. 41; May 8, 1855, 2 Macq. 100. "Enlarging the time is an act of judgment," etc.—Russ. 141, [4th ed., 132]. See style of minute of prorogation in Appendix.

[2] Donaldson, Jan. 26, 1770 (Dicty. Arb., Appendix No. 1).

[3] Halkett, Dec. 16, 1826, 5 S. 140; Montgomerie, Dec. 8, 1849, 12 D. 274; Orrell, Feb. 22, 1859, 21 D. 554; see also E. of Selkirk, Jan. 17, 1778 (627).

[4] Paterson, May 15, 1829, 7 S. 616.

safely intrusted with this, as with any of the other powers conferred on them.

328. An act of prorogation is usually executed in the form of a signed minute, which is written on the same sheet with the submission, where there is room for it; and otherwise on any separate sheet: in which latter case, care must be taken that the minute is so expressed as to bear evidence, *in gremio*, identifying it clearly with the contract of submission to which it applies.

329. A minute executed by one or more arbiters does not require to be either holograph or probative. It is enough if it be signed by the arbiters. It should be accurately dated, so that it may appear, *ex facie*, to have been timefully executed.

330. At one time it was doubted whether the minute of prorogation, from its intrinsic importance, did not require to be a probative writ, like the submission itself. But it is now settled otherwise.[1] The minute is an official act, which is merely an intermediate step in the connected procedure of the submission; and it is always signed by the arbiter,—that is, by one whom the parties have clothed with a *quasi* judicial office. His signature is held sufficient for its authentication.[2]

331. An act of prorogation is generally made by the arbiter, *proprio motu*, at such time as he considers most convenient. It does not require previous notice to be given to the parties,[3] nor to be subsequently intimated to them. If executed *tempestivè*—that is, during the currency of some subsisting term of the submission—the prorogation is valid as soon as it is signed. But it must be signed timefully by all the arbiters; or by a majority, where a majority are empowered to act.

332. When the minute prorogates the submission "to the day of next to come, this clause, in what way soever the blanks shall be filled up, cannot possibly reach beyond the year."[4] The

[1] Stewart, Mar. 8, 1804, F. C.; Kirkaldy, June 16, 1809, F. C.; Gordon, Dec. 10, 1812, F. C.

[2] During the discussion of the case of Gordon, *supra*, argument was specially ordered on the point, "How far the prorogations on the submission, by a single arbiter, not tested in terms of the statute, are sufficient to prove their own dates." It is stated in a memorandum, taken from the note-book of L. President Boyle, respecting this case (Park. Syn. xvii. 54), that "specific allegation must be made that the dates of prorogations and devolutions are false, to get the better of the arbiter's attestation." See also Sess. Papers.

[3] It may be remarked, that in the Roman law, which required the presence of the parties at the delivery of the award (unless otherwise declared in the submission), no such rule apparently applied to the execution of an act of prorogation. "Diem proferre, vel præsens, vel per nuntium, vel per epistolam (arbiter), potest."—Poth. ad Pand., L. 4, t. 8, sec. III. (17).

[4] 4 Ersk. 3. 29. The observation applies to the submission; but "the term of such prorogation is regulated by the same rules as in the case of an original submission."—Note (175) on the above passage of Erskine; Ivory's edition.

same result follows where the clause is more briefly expressed "to the day of next."[1]

333. Even when the blank in the minute is not followed by the restrictive words, "next to come," or "next," the blank itself, nevertheless, implies an endurance of the contract, without prorogation, only for the space of one year.[2]

334. Where a submission stood prorogated on 5th February 1823, "to the day of next," and the subsequent prorogation was executed on 6th February 1824, an objection was taken, that, by the lapse of a full year, the submission had fallen at the expiry of the 5th day of February 1824. But it was held that the prorogation was timefully executed, being within year and day.[3]

[1] On 22d Nov. 1814, a prorogation was executed "to the day of next." An award was pronounced on 4th July 1816. Held that the submission had expired by the lapse of a year from 22d Nov. 1814.—Thomson, Jan. 28, 1818, F. C.

[2] In a submission containing full powers of prorogation, the arbiter, on 4th March 1814, prorogated "the term for determining the same, to the day of . In witness whereof, etc." After some years of subsequent procedure, without any further prorogation, an award was pronounced which was brought under reduction, in respect that the submission had fallen by the lapse of a year from 4th March 1814. It was pleaded in defence, that the arbiter, having ample power to prorogate, had, *ex proposito*, omitted the usual limiting words of "next," or "next to come;" and that this excluded the limitation of a year. But the Court found that the minute "had the effect of prorogating the submission for a year only, from the date of the minute," and that the submission expired at the end of that period.—Stark, Dec. 23, 1820, F. C.

[3] E. of Dunmore, May 13, 1829, 7 S. 595. L. J. Clerk Boyle, L. Glenlee, and L. Pitmilly, being the whole Judges present, concurred in adhering to the interlocutor of L. Medwyn, Ordinary, which repelled the reason of reduction, founded on the alleged lapse of the submission as soon as the "year" was expired; which reason was maintained to be supported by Erskine, 4. 3. 29. It was answered, that in Bankton, 1. 23. 7, and in decisions (Menzies, Feb. 1665; 639), the period was stated to be "year and day;" that this was consistent with various other analogous computations of time, and that it included the whole day of 6th February 1824. After an inquiry into the practice which proved inconclusive, the opinions of the Judges were only given with a certain degree of qualification; and however much it might be expected that the precedent then made would govern any future case to which it was applicable, it would still perhaps be the most prudent course for an arbiter to avoid raising any question, by prorogating, at latest, on the same day, next year, on which he had dated his last prorogation. On a question of the computation whether a marriage had subsisted for "year and day," which was contracted on 23d November of one year, and dissolved by the wife's death on 23d November of the year following, see Waddell, June 7, 1681, 2 Suppt. 279. In this case, Stair's report bears that a proof being led, "both men and women were allowed as witnesses *ex officio*." It appeared that the parties had been married between eleven o'clock A.M. and one P.M., and that the wife's death took place between ten and eleven P.M. But without going into a question of hours, the Court found "that the adjection of a day to the year was to shun the debate of hours or moments; and therefore found it being proven that the woman was married the 23d day of November, and died the 23d day of November the next year, there could not be two 23ds of November in one year, and therefore the woman lived one year and a part of the day of the

335. In one case, the exercise of the power of prorogation, though confessedly made during the subsistence of the submission, was challenged in the particular circumstances in which it took place, as being made, *parte inaudita*, to the prejudice of the absent party, and during the interval between the death of a party and the sisting of his representative. But the Court, without difficulty, sustained the validity of the prorogation.[1]

336. Even although an arbiter may have omitted to prorogate timefully, the submission will not fall, if the parties choose to continue to plead before him. It is completely within their power, if they please, to consent to his continuing their arbiter, though no minute of prorogation has been executed. The arbiter's whole jurisdiction is radically based at first on the consent of parties; *jurisdictio in consentientes.* It may, therefore, be as easily renewed as it was at first granted, by their consent; and in the case of a renewal, the evidence of such consent may either be given by express writing, or by the performance of such acts and deeds as clearly evince, beyond doubt, that such consent is actually given. It is requisite, however, in this as in other cases of homologation, that the acts inferring consent be performed in the full knowledge of the circumstances.[2]

337. It seems doubtful whether, under the ordinary general power to prorogate "from time to time, as the arbiter shall see cause," it would be competent for an arbiter to execute a prorogation for a

next year; and so the tocher was found to belong to the husband, and he was assoilzied from repetition." Even assuming that an arbiter can prorogate for "year and day," this case would strongly suggest the prudence of his renewing a prorogation, at latest, on the recurrence of the same day, next year, with that on which he had dated the term of his preceding prorogation, as that day was there held to fill up the full "year and day."

With respect to the date from which the commencement of the first year of the contract of submission should be computed, see *infra*, Duration of the Submission.

[1] The trustee on a sequestrated estate was one of the parties to a submission, under which a power of prorogation was conferred on the arbiter, and in which it was declared that the contract of submission should subsist notwithstanding the death of either party. The trustee died, and the arbiter executed a prorogation in the interval, before his successor was appointed. In a suspension of the subsequent award, an attempt was made to show that this proceeding was like "a judgment of a Court of law, pronounced after the decease of a party to an action, and before his representatives have been sisted to appear." It was also contended, that the parties should have been allowed an opportunity of being heard by the arbiter before he made a prorogation for any given time. The Court repelled the reasons of suspension, and sustained the award.—Ewing and Co., Dec. 19, 1820, F. C.

[2] See Macilhose, July 13, 1738, 5 Suppt. 204. [Paul *v.* Henderson, March 15, 1867, 5 Macph. 613.] See *infra*, Effect of homologation, etc.

In England, a similar rule appears to apply. "The conduct of the parties" may amount to a consent by them to an enlargement of the time of the submission; as, for instance, if they attend meetings before the arbitrators, "with a full knowledge of the circumstances."—Russ. 144, [4th ed., 135].

longer period than one year at a time. In general, the submission itself is so expressed, that its own endurance, while unprorogated, would not extend beyond a year. In these circumstances, the ancillary and subsidiary power of prorogation, "from time to time," especially when the state of practice is considered, would probably be held to extend only to a period not exceeding that of the original endurance of the unprorogated submission, viz., one year. An act of prorogation for a longer period at once could scarcely be supposed to be fairly within the contemplation of the parties in such a submission.

338. When the power of prorogation is so expressed as to authorise the arbiter simply to prorogate "at pleasure," the words certainly seem to be very general and comprehensive. But still it would be most prudent, even in such a case, to exercise the power of prorogation according to the usual practice, and so as not to exceed a year at a time. The power of prorogation, like every other power with which an arbiter is intrusted, is given in order to be used solely in so far as may be requisite for enabling him to perform his duty. If he could prorogate at once for more than a year, he could apparently prorogate at once for five or ten years, or longer, as effectually as for eighteen months or two years at a time. But it is evident that a prorogation for those more extended terms could not be a fair and conscientious exercise of the power for its only legitimate purpose; on the contrary, it would be a mere abuse of it, because a term of five or ten years might have the effect of hanging up the matters in dispute indefinitely and injuriously, while it could not be viewed as in any sense requisite for carrying on the business of the submission to its close, more than any other period whatever. It could not, therefore, be within the intention of parties to confer such a power upon the arbiter. But all necessary extension (and therefore all legitimate extension) of the term of the submission is fully and easily attained by the method in common practice, of making successive annual prorogations, the number of which adjusts itself with reasonable and elastic adaptation to the requirements of the business of the submission. And as prorogation may be fairly said to be made, in truth, "at the pleasure" of the arbiter, when he can renew it at his pleasure, though only for a year at a time; it would apparently be imprudent for an arbiter to execute a prorogation for a longer term, even though he has received a general power to prorogate "at pleasure."

339. On the whole, therefore, it would seem safest that an arbiter should not make any single prorogation for a period exceeding a year, unless in the case of a power of prorogation being given, which was couched in a different style from any which is commonly used in present practice.

340. Where the eventual nomination of an oversman is con-

templated in the submission, it is usual to confer the same power of prorogation upon him as upon the arbiters. Generally speaking, there will be the same reason in the nature of the thing, for doing so, as he just becomes sole arbiter when the submission devolves on him, and requires the same powers as his predecessors, the arbiters, in dealing with the same case. It is a natural presumption, that the parties intend to bestow the same power of prorogation on the oversman which they have bestowed on the arbiters; and, therefore, if the submission fairly admits of that construction, the Court will incline to adopt it.

341. A submission provided that "whatever the said arbiters, or, in case of their variance, the said oversman, shall determine in the matter, conform to their decree-arbitral, to be pronounced by them, betwixt and the day of next, or any other day to which *they* shall prorogate this submission, which *they* are hereby empowered to do, both parties oblige them to stand and abide at," etc. The submission devolved on the oversman, who did not pronounce an award until after he had executed a prorogation. His award was brought under suspension, in respect that, by the above clause, a power of prorogation was given to the arbiters only, and not to the oversman. Kilkerran, in reporting the case, observes: "The Lords repelled the objection. They considered the power of prorogation, by the above-recited clause in the submission, to be given to the same parties to whom the power of determining was committed; that is, to the arbiters, and, in case of variance, to the oversman."[1]

342. In a more recent case, a similar decision was given in circumstances which indicated the purpose of the Court to prefer, as far as they legitimately can, that construction of the contract of submission which gives full effect to the true meaning of the parties. A submission gave "power to the said *arbiters or oversman* to receive claims, etc., and such other writings as the said *arbiters or oversman* shall judge necessary, etc., and to take all manner of probation they shall think fit, by writ, witnesses, or oaths of parties; and whatever the said *arbiters* shall determine, in whole or in part, in the premises, betwixt and the day of next to come, or on or before

[1] Macbryde, etc., July 21, 1748 (657).

It may be noticed here, as indicating the desire of the English courts to give effect to the plain meaning of the parties, in dealing with the construction of a prorogation clause, that, in one instance, where an obvious *lapsus pennæ* had occurred, omitting important words in such a clause, the Court nevertheless read the clause as if the words had been duly inserted. The arbitrator was empowered to make his award on or before a certain day, "or on such further day as he, by memorandum in writing, under his hand, indorsed thereon," etc. The two necessary words, "shall appoint," had been omitted before the words, "by memorandum in writing," etc. But the Court held the import of the clause to be the same as if the omission had not occurred; and, accordingly, the arbitrator was found to have had authority to enlarge the time of the submission.—Russ. 140, [4th ed., 131].

any other day to which *they* shall prorogate this submission, which they are hereby empowered to do from time to time, as they shall see cause, both parties bind and oblige themselves, their heirs, etc., to acquiesce in, implement, and fulfil." The submission devolved on an oversman, who executed repeated prorogations before he pronounced his award. A reduction was brought, *inter alia*, in respect that, by the conception of the submission, no power of prorogation had been conferred on the oversman, but expressly on "the arbiters" only; so that the submission had expired long before the award was pronounced. It was successfully maintained in defence, that the principle of the above case of Macbryde, etc., applied; and that, as the obligation to abide by the award extended only to an award pronounced by those on whom the power of prorogation was conferred, it followed that the submission must either be read as conferring that power on the oversman, or else as not binding the parties, in any event, to abide by an award pronounced by the oversman; which last reading was so much opposed to every sound or rational rule of construction, that nothing but inevitable necessity could warrant the Court in adopting it. The Court held that the power of prorogation had been conferred on the oversman, and their decision, sustaining the award, was affirmed on appeal.[1]

[1] Glover, Feb. 11, 1805, 4 Paton, 655. See also Appeal Papers in Adv. Library. In connection with this subject, a recent case may be noticed, in which ample powers of prorogation had been conferred by minute of submission upon two arbiters, before whom considerable procedure had taken place, when the submission fell by the death of one of them. The parties thereon executed a new and brief minute of submission, which was not framed in any formal or technical style, in favour of the surviving arbiter, David Lind, authorising him "to uplift all the papers in the process of this arbitration; we hereby further authorise the said David Lind to judge solely and finally on our behalf, from and after this date, as regards this our disputed matters," etc. Under this authorisation, the arbiter, after having executed a prorogation of the submission, pronounced an award, which was brought under reduction, in respect that he had received no power to prorogate, and therefore the submission had fallen before the award was pronounced. Independently of a plea of homologation, founded on the actings of the parties, it was maintained in defence,—1st, That the minute of submission to Lind contained no limitation of time, and therefore no prorogation of the submission was requisite; and 2d, That the last minute of submission must be taken in connection with the previous minute of submission, which it substantially renewed, *tantum et tale*, in the person of the surviving arbiter; that, consequently, the same powers as to proof, etc., prorogation, etc., which were conferred on Lind and his co-arbiter previously, were continued in Lind as sole arbiter; and that the actings of the parties proved this to be the meaning which they themselves attached to their last minute of submission.

The L. Ordinary, Ardmillan, found "that the said submission to Mr. Lind, whether it be viewed as a distinct and independent submission, or as relative to the prior submission, was still subsisting at the date when Mr. Lind pronounced the decreet-arbitral sought to be reduced." His Lordship therefore repelled the reason of reduction founded on the alleged expiry of the submission, and the Court adhered.

L. Pres. M'Neill observed: "I think the true meaning of this minute was to

343. "The power of prorogation is incidental and ancillary to deciding the matters referred; and it is a power, upon the exercise of which a discretion must be exercised, just as much as any other part of the contract."[1] This doctrine was elucidated in a recent case, in which two arbiters, who had a power of making part-awards, came to agree on all the points in dispute, excepting two. They referred these two points to the oversman's determination, and "devolved the submission on him to that extent, with all the powers competent to the office of oversman." The submission had conferred a power of prorogation both on the arbiters and the oversman respectively. The arbiters themselves did not, before devolving, make any award as to the points on which they were agreed. Nor did they make their award on these points until after the oversman had required to execute a prorogation, in order to prevent the submission from lapsing. In these circumstances, it was held in the House of Lords, that no prorogation executed by the oversman could keep up the submission as to points not devolved on himself; and, consequently, that no prorogation executed by him could enable the arbiters to make any valid award at all, seeing that *quoad* the arbiters, the submission had come to an end, and each of them was already *functus officio* at the time when they executed their award.[2]

substitute Mr. Lind in place of the two arbiters under the original submission; and although there is no express power of prorogation, I think it is to be construed by the conduct of the parties."

L. Ivory.—"I think that the true construction of matters is, that the minute was intended to be ancillary to the former minutes; and it is clear, from the words of that minute, taken as construed by the conduct of the parties themselves, separate from the question of homologation, that it was intended to confer the same power of prorogation and of decision that was conferred by the previous minutes."

L. Curriehill and L. Deas expressed similar opinions.—Gowans, Feb. 3, 1859, 21 D. 403.

[1] Per L. Cranworth, C., in Lang, May 8, 1855, 2 Macq. 100.

[2] Lang, May 8, 1855, 2 Macq. 93.

Several interesting points in arbitration law are involved in this case, which are respectively noticed in their appropriate places. It involved, *inter alia*, doctrine of much importance in the law of prorogation.

A submission empowered the arbiters, in the event of their disagreeing, to name an oversman; "and whatever the said arbiters or oversman shall determine in the premises, by decreet-arbitral or decreets-arbitral, interim or final, to be pronounced by them betwixt and the day of next to come, or betwixt and any other time to which the said arbiters or oversman shall prorogate this submission, which they are hereby authorised to do at pleasure, the said parties" bound themselves to fulfil. After having agreed on all points but two (one of which was the expenses of the submission), the arbiters signed and issued notes of their opinion on 10th November 1846, and directed the clerk to prepare an interim award on these principles, to be subscribed by them, if no representation should be lodged against the notes within fourteen days. They also named an oversman, and directed the clerk to prepare a minute, narrating that they had agreed on all points but two, and stating, "We nominate (A. B.) to be oversman, and refer the said two points to his determination, and devolve the submission on him to that extent, with all the powers

CHAPTER VII.

POWER OF DEVOLUTION OF THE SUBMISSION.

344. WHEN, in place of one sole arbiter, there are two arbiters chosen, one by each party, it is obvious, that if they should disagree

competent to the office of oversman." The oversman accepted, and he afterwards executed a prorogation of "the matter referred;" and, before the prorogated term of the submission expired, the arbiters had executed an award giving effect to the views contained in the signed notes issued by them on 10th November 1846. But the date of this award was not only subsequent to the minute of devolution, but was more than a year after the last prorogation executed by the arbiters themselves; so that, unless the prorogation which was executed by the oversman was sufficient, not only to keep up the submission, in so far as regarded the two points devolved on himself, but to keep up the whole submission, including the points reserved by the arbiters for their own award, the award by the arbiters must be invalid, as having been pronounced after they were entirely *functi*.

In a reduction which was brought of the arbiters' award, on the ground above stated, and of the oversman's award, as incapable of standing by itself, the L. Ordinary, Wood, found the arbiters' award "ineffectual and null;" and, before further answers, appointed certain procedure. In a note to his interlocutor, his Lordship observed, that "he is inclined to think that when a submission is entered into, to arbiters, and, in case of their differing in opinion, to an oversman, to be appointed by them, it is not contemplated that the proceedings may be divided into two parts, with co-existing powers in the arbiters and oversman; and that, on the contrary, the view is, that the powers of the one are to end whenever those of the other commence—that the submission is to depend before the arbiters as a whole, while they are acting in that capacity; and it is only when they have determined entirely to divest themselves of it, and have finally terminated their actings as arbiters, that it is to be transferred to an oversman; by the devolution on whom it is to be carried to all operative and active effects, away from the arbiters, who are then to be held *functi officio* and put under the oversman's jurisdiction."

After noticing that the minute of devolution specified two explicit points, and only "devolved the submission to that extent," though "with all the powers competent to the office of oversman," his Lordship observed, that the oversman "might prorogate the submission so far as devolved on him. That was as much within his proper province, as the deciding the points referred to him. But how could any prorogation of his go further?" "The prorogating the submission is an act of jurisdiction in the matter to which it relates. It is, in fact, one of the most important character; for, by it, the jurisdiction which would otherwise expire, is prolonged. The time for exercising it—that is, for deciding the matters submitted—is extended. The power to prorogate is given for that purpose. It is thus an act of jurisdiction, which, from the nature of the thing, is connected with, and incidental to, the matter referred to the party by whom the prorogation is to be made." "In a submission with a power of devolution, the devolution made by the arbiters is just a submission in succession to the primary one, either wholly or *pro parte*. The arbiters have power to prorogate the submission as regards the matters referred by it to them; that is, all the matters submitted. The oversman has the power to prorogate the submission in regard to the matters referred to him by the devolution." "Is not the oversman's prorogation to be taken as made in relation to that matter, for the extrication or decision of which he was appointed—as applying, and

in opinion, the submission would be exposed to the hazard of becoming abortive for want of an award, unless special provision were made for that contingency.[1] This is done by the nomination of an Oversman

being intended to apply, to that which was alone referred to him—and not to that which was not referred, but positively kept back from the reference to him; with which, consequently, he had no concern; and for assisting towards the decision of which, either in one way or another, by any act of his, it is therefore contrary to the course and character of the proceedings, to infer that any power was bestowed on him, or any meant to be exercised, by that which was done by him?"

When the case was taken to the Inner House, the whole Judges were consulted. The opinions were found to vary on several points in the law of arbitration, as will be more particularly noticed elsewhere. A majority of the Court (holding, *inter alia*, that the oversman's prorogation kept alive the whole submission, and not merely the part devolved upon himself) altered the interlocutor of the L. Ordinary, and sustained the arbiter's award.

On appeal, L. Cranworth, C., reversed this judgment, and reinstated that of the L. Ordinary; expressing, at the same time, an opinion which very much coincided with that of L. Wood. L. Cranworth, *inter alia*, observed: "I consider it to be clear, that the power of prorogation by the oversman is confined to the matters referred to him; and that I conceive disposes of the whole question. I think this is a conclusion necessarily resulting from the nature of the office which he fills. When the arbiters differ on any point, and this point is referred to the oversman, the submission must be read, just as if he had been named the sole referee, and as if the points referred to him were the only matters in dispute. The submission did not mean to give him any power to determine whether it would, or not, be right for the arbiters to prorogate any time for making their award. The power of prorogation is incidental and ancillary to deciding the matters referred; and it is a power, upon the exercise of which a discretion must be exercised, just as much as any other part of the contract." His Lordship also observed, that "these consequences flowed from the nature of the case;" and were illustrated by the terms of the minute of devolution, which placed the oversman "as if there were no other matters in difference but those which were referred to him." His act "prorogated and adjourned the submission,—that is, as far as he was concerned; for with regard to no other part of the submission had he any authority." "How does his prorogation affect other matters? Evidently not at all." "The right of prorogation is a discretionary right, to be exercised as the interests of the parties may require; and it is a right to be exercised with reference to those matters that are before the party by whom that discretion is to be exercised."

[1] Merry and Cunningham, June 7, 1860, 22 D. 1148. [Affd. March 26, 1863, 1 Macph., H. L., 14.] In a submission-clause contained in one of the heads of agreement of a mineral lease, it was provided that, "should the minerals become exhausted, or workable only at an evident loss, the tenants shall be entitled to give up the lease, on the same being ascertained by arbiters mutually chosen." This was found to be a binding obligation to submit to two arbiters mutually chosen, but not to entitle one party to require the other to concur with him, either in nominating an oversman, or in giving power to the arbiters to name an oversman. With respect to the obvious hazard of the submission being rendered abortive in the event of the arbiters differing, and no oversman being named, some of the Judges indicated opinions that possibly the parties might nevertheless be able to obtain an operative remedy from the Court. It may be observed, that indications of opinions bearing on the remedial powers of the Court, in the contingency of an arbiter's failure under peculiar circumstances, were made by some of the Judges in E. of Selkirk, Jan. 17, 1778 (627), and Hailes' Dec. 780.

or Umpire, on whom the submission may be devolved, in the event of a difference of opinion occurring between the arbiters.[1]

345. The nomination of an oversman may be made by the parties themselves, in the deed of submission, if they can agree upon the same individual; or it may be made by the arbiters, if power to that effect be specially conferred on them. But, unless the submission expressly gives this power to the arbiters, they cannot appoint an oversman.[2] Because the mandate which bestows power upon two selected arbiters, themselves to judge and decide between the parties, does not in the least imply the further and very different power of devolving the right of judging and deciding upon another person altogether.

346. Where the parties themselves can agree upon an oversman, it seems advisable that they should name him at once in the deed of submission. This is undoubtedly competent; and it insures the selection of a man in whom both the parties feel confidence; besides which, it excludes all risk of the serious embarrassment which results when arbiters disagree in the choice of an oversman.

Where the parties, in place of themselves naming the oversman, empower the arbiters to do so, it would seem the most eligible course that the arbiters should proceed to select him immediately after their acceptance of office, and before they enter further on the business of the submission. It is clearly competent for them to do this;[3] and if they delay taking this step until after they shall have discussed together and disagreed in opinion, it may sometimes happen that personal feeling shall arise between them, and interfere with their uniting in the choice of the same individual as oversman. Accordingly, it has been expressly enjoined, in the statutory arbitrations under the Lands Clauses, etc., Acts, that the arbiters shall nominate an umpire before they enter on the matters referred to them.[4] The same course should be voluntarily followed in an ordinary submission.

347. The parties, in confiding to arbiters the important power of

[1] It may be noticed, that a recent case affords the rather unusual example of an oversman being named, although there was only one arbiter appointed in the first instance. The plan of the submission was, that after an award should have been pronounced by A. B., the arbiter, either party was empowered to appeal to C. D., as oversman, named in the submission, whose award was to be final; and, in so far as C. D. should not, within a limited time, pronounce an award, altering in whole or in part the original award of A. B., the latter was to become, *ipso facto*, final.—E. of Hopetoun, Mar. 6, 1856, 18 D. 739.

[2] Matheson, July 1, 1842, 4 D. 1472. It would rather appear, however, that as the parties, by sufficient acts of homologation, may effectually prolong the endurance of a submission when it would otherwise have fallen for want of a timeful prorogation by the arbiters, so they might, by sufficient acts of homologation, confirm, beyond all after-challenge on their part, an appointment of an oversman which was originally invalid. The law of England appears to be, in this respect, the same.—Russ. 195, [4th ed., 186].

[3] Brysson, June 10, 1823, 2 S. 340.

[4] See 8 and 9 Vict. c. 19, sec. 26.

selecting an oversman, necessarily rely, that in performing this duty, they shall *bona fide* exercise their judgment in choosing the proper person on whom so delicate a trust-power is to be devolved. If, therefore, in place of doing so, the arbiters shall commit this matter to mere hazard or wager, as by tossing, or by drawing lots, either for the exclusive right to choose the oversman, or for determining which of several men shall be the oversman; this is a violation of their duty, and involves a breach of an important obligation to the parties, which was tacitly undertaken by the arbiters in the very act of accepting their office under the contract of submission. It is an act *ultra fines mandati*, so that the nomination, and all that follows on it, are liable to be set aside.[1] The arbiters might as well toss for the award to be pronounced, as for the oversman to be selected.

348. When power is given to arbiters to nominate an oversman, it appears to be implied, that, in the event of his non-acceptance of the office, the arbiter's power of nomination is not exhausted, and they may appoint another. In truth, the person nominated is not, *de facto*, an oversman until he has accepted the office; the nomination by the arbiters is in itself only a tender or bestowal of the office, conditional upon acceptance; and, in the event of non-acceptance, the mere *conatus* towards an effectual and complete nomination should not be held to exhaust that power which was conferred on the arbiters for important practical purposes, such as ought not lightly to be disappointed.[2] It would seem in every case most reasonable, however, to ascertain beforehand whether an oversman will accept, and only to execute the nomination after having made sure of his acceptance.

349. If an oversman, on whom the submission has been devolved, should die before pronouncing an award, it would appear that the

[1] This has been so held in England, *in re* Cassell, 9 B. and C. 624. The principle of the decision would apply with equal force in Scotland.

In one case it was held by Lord Ellenborough, that, provided there were two persons, both of whom were confessedly fit to be umpires, and that the tossing merely decided which of these two should be chosen, such a mode of selection was valid. But, in subsequent cases, Russell observes, that the English Courts have thought it better to avoid nice distinctions, and to hold it always an invalid procedure to select an oversman by the event of a toss.—Russ., p. 226, [4th ed., 218], and references there. See however, on this subject, the opinion of Erle, C. J., in European and American Steam Shipping Co., Jan. 27, 1860, 29 L. J. 155, C. P.

It is held in England, that the parties, if aware of all the circumstances, may validate the selection of an umpire, though made by tossing; and that they may do so, either before or after the tossing, provided that their assent be clearly given. —Russ., pp. 227, 228, [4th ed., 219]. See also Tunno, Nov. 4, 1833, 5 B. and Ad. 488.

There seems to be little doubt that the same rule would be applied in Scotland, as the power of the parties, in selecting an oversman, is evidently a very different thing from that of the arbiters; and, in particular, in the person of the parties, such power is not a trust-power at all.

[2] This is so held in England.—Russ. 228, [4th ed., 220].

submission is thereby necessarily brought to an end, the arbiter's power of nomination having been effectually exercised, and they being *functi* by the devolution on the oversman. But, in such a case, it would be competent for the parties themselves, if they agreed on a new oversman, to appoint him by a minute, which, however, ought in prudence to be probative, as it is substantially a new submission to a sole arbiter.[1]

350. In like manner, if the arbiters could not agree on the choice of an oversman, it would be competent for the parties, if they could agree on an oversman, to execute a minute, appointing him. But this also would seem to be substantially a new submission to a sole arbiter, and ought therefore, in prudence, to be a probative writ.

351. The mere act of nominating an oversman, at the outset of a submission, does not in itself devolve any part of the submission upon him.[2] Accordingly, the arbiters themselves proceed to consider the case, and, if they shall agree in opinion, to pronounce an award, notwithstanding their having nominated an oversman. But if they find they cannot agree in opinion with each other, and that the event has thus occurred, which renders a devolution of the submission both competent and necessary, they then execute a minute of devolution.[3] If one of the arbiters should die after having nominated an oversman, but before they differed in opinion, this would not devolve the submission on the oversman, but would cause the whole submission to fall. Because, by the conception of the submission, no devolution upon the oversman was authorised to take place, until after the arbiters should first have differed in opinion. This event, however, had not occurred during the lifetime of the deceased arbiter; so that no power to devolve had ever emerged. Besides, the act of devolution is one which it is not competent for a single arbiter to perform.[4]

352. The minute of devolution narrates that the arbiters have differed in opinion, in consequence of which it has become necessary for them to execute a devolution; and it then proceeds to devolve the submission (in whole or in part, as the case may be) upon the oversman.[5] By this act, the arbiters cede their own office and connection with the submission; the oversman, in entering on his duties, is substituted in their room; and each of the arbiters is *functus officio.* No technical style is requisite for this minute. From its great importance as a step of procedure, which in effect propels the submission

[1] See instance of this in Gowans, Feb. 3, 1859, 21 D. 403.

[2] Telfer and Co., Jan. 31, 1823, 2 S. 150; Bryson, June 10, 1823, 2 S. 340.

[3] [Frederick *v.* Maitland and Cunningham, July 7, 1865, 3 Macph. 1069.]

[4] If the parties chose, they could of course regulate this matter otherwise when framing the contract of submission, and could declare that the death of one of the arbiters, occurring *quandoounque*, should *ipso facto* devolve the submission on the oversman. The doctrine in the text applies to the ordinary style of the submission exemplified in the Appendix.

[5] See style of minute in Appendix.

to a new arbiter, it is often executed with all the formalities of a probative writ. But it is not necessary that it should be so.[1] The minute is not an isolated document, but an intermediate step of procedure, and the signatures of the arbiters are enough to attest its authenticity. It should be accurately dated, so as to show *ex facie* that it has been executed by the arbiters before the expiry of the term of the submission. It should distinctly design the oversman, and specify with precision to what extent the submission is devolved on him, wherever the arbiters themselves have disposed of part of the submission by their own award. When the devolution is total, it is of the simplest kind.

353. It is inherent in the nature of the office of an oversman or umpire, and it is expressed in the style of the submission itself, that he shall only act in the event of the arbiters having first differed in opinion. An oversman is not merely a third arbiter co-ordinate with the other two. His tribunal is ulterior to the tribunal of the arbiters. By the conception of the submission, the arbiters themselves are the *forum prædilectum*, to whose joint judgment, if it can be obtained, the matters in dispute are primarily and preferably submitted. It is the duty of the arbiters, therefore, to endeavour, by the use of all proper and reasonable means, to form a just judgment on the matters submitted; as that is the true way to bring their views into accordance and unity. Their power to devolve has not, in fact, emerged under the submission until they have first ascertained that they "differ in opinion" from each other; which means, that they differ, after having, both and each, fairly endeavoured to form an arbitral opinion upon the case. But if, after an earnest effort to inform their minds, and to make up arbitral opinions upon the subjects submitted, they find that their opinions vary irreconcilably, or vary so widely as to exclude any reasonable prospect of agreement, they have then performed the duty which they themselves undertook, as arbiters, towards the parties; their power to devolve has then legitimately emerged under the submission; and it is their duty to exercise it, as the submission would otherwise become abortive.[2]

354. It is in no way inconsistent with the substitutional character

[1] Stewart, Mar. 8, 1804, F. C.; Kirkaldy, June 16, 1809, F. C.; Gardner, Jan. 19, 1773 (659). The case of Herriot, Jan. 20, 1780, F. C., as reported, is stated to have been subsequently altered (see 4 Erak. 3. 29); and, if not so, it has since been overruled.

[2] It may be noticed that, in England, "when the umpire's power is to commence on the disagreement of the arbitrators, to justify the umpire in interfering, there must be such a difference between the arbitrators as renders their agreement in an award hopeless. Whether there has been such an essential difference, is a question of fact, to be decided sometimes by a jury, sometimes by the Court, according to the nature of the proceedings."—Russ. 231, [4th ed., 223]. [Frederick *v.* Maitland and Cunningham, July 7, 1865, 3 Macph. 1069.]

of an oversman's office, that, if the arbiters and he agree upon the subject, he should sit along with them when evidence is led, or parties are heard, before them. This is mere matter of arrangement; an arrangement which is sometimes made, as it tends to save both time and expense. It will frequently serve to prepare the oversman to act, by pronouncing an award, as soon as a devolution shall be made upon him. And, in the event of no devolution ever being executed, his presence at the proof, etc., does not in any degree affect the validity of the actings of the arbiters, or of the award pronounced[1] by them. He possesses no official power until after a devolution shall have been made in his favour; but when this is made, his powers, as oversman, to order further proof or hearing, as well as in all other respects, are the same as if he had not sat along with the arbiters at any proof or hearing, while they were still charged with the submission.

355. In the ordinary submission, a signed minute of devolution is the appropriate and regular mode of devolving the submission upon the oversman. Nothing else should be relied on as sufficient. The want of a devolution was held to be fatal in a submission, in which the arbiters had power to choose an oversman, and in which the report states that they had come to differ in opinion, so as to open the way for naming an oversman and devolving. But the report further bears, that, in place of duly nominating an oversman, and devolving on him, "an appeal was made to the opinion of a third party, who assumed the character of an oversman, and pronounced a decreet-arbitral which did not exhaust the submission." In a reduction of the award, the Court found that "there is no devolution upon the oversman subscribed by the parties, nor does it appear from the extract of the submission and decreet-arbitral produced, that the oversman had any authority to act." The interlocutor, at the same time, reserved power to the defenders to bring a proving of the tenor of a certain joint-letter, which was alleged to have contained a devolution, but to have been allowed to fall aside. It may be observed, that the session papers in this case show that the award narrated that the arbiters had differed in opinion.[2]

356. But although the execution of a minute of devolution is thus important in the ordinary submission, it sometimes happens that a submission is so conceived that the office of the arbiters is evacuated, and the office of the oversman called into full action in its place, without the intervention of any such minute. As, for instance, when it is declared that, if no award shall be pronounced by the arbiters before a certain day, the submission shall on that day devolve, *ipso facto*,

[1] Crawford, Feb. 4, 1858, 20 D. 488; Middleton June 9, 1721, Rob. App. Ca. 391.

[2] Telfer and Co., Jan. 31, 1823, 2 S. 150.

upon the oversman.[1] As soon as the day has arrived, without an award by the arbiters, the condition is purified which renders the oversman sole arbiter in the room of the two superseded arbiters.

357. Even in the case of more ordinary styles of submission, there are various instances in which an award, signed by an oversman (sometimes alone, sometimes along with one of the arbiters), has been sustained, although no minute of devolution had been executed. These cases deserve special attention, not for the purpose of suggesting that it can ever be safe or expedient to dispense with such a minute, which is out of the question; but to show that, where such an oversight has occurred, the Court have repeatedly held, in particular submissions, that it was not fatal; especially where the submission empowered the oversman and either of the arbiters to give an award, and where the award, signed by the oversman and one of the arbiters, expressly narrated that the arbiters had differed in opinion.

358. In the case of Middleton,[2] an award signed by the oversman alone was sustained in the House of Lords, though no minute of devolution had been executed, nor any writing signed by the arbiters recording their difference in opinion. But the procedure under the submission was marked by several specialties. The submission was limited in endurance to one month. The oversman, who was named in the submission, sat along with the arbiters at repeated hearings. A day was then fixed, within seven days of the expiry of the submission, for the delivery of an award by the arbiters. On that day the arbiters met, and one of them stated his opinion. The other declined to pronounce any opinion. One of the parties thereon took a protest, and "the oversman, being present, in consequence of what passed between the arbiters, appointed the next day for giving his judgment." He accordingly, on the following day, gave his award, which specially recited that the arbiters had met and differed. In a reduction, the Court of Session "found that the arbiters, not having differed in their opinion as to their determining in the foresaid submission, but only one of the arbiters declining to determine, the oversman was not thereby empowered to pronounce his decree; and therefore found his decree null." On appeal, the House of Lords reversed this judgment.

359. The opinions of the Judges in the House of Lords are not reported. Apparently, it had been held that the special narrative in the oversman's award, setting forth that the arbiters had met and differed, was sufficiently corroborated by the actual procedure under

[1] This style of submission appears to be occasionally employed in England.—Russ. 229, [4th ed., 221]. It is recommended also by a highly respectable authority in Scottish practice, as a style which would frequently be found advantageous in those cases in which the oversman is named by the parties in the contract of submission.—Russ., Theory of Conv., p. 115.

[2] June 9, 1721, Rob. App. Ca. 391.

the submission. The conduct of the arbiter,—who, after much procedure in the form of hearings, etc., for the purpose of forming an opinion, took the course of refusing to give any opinion at all on the day and at the place fixed for the purpose of delivering an award,—had probably been viewed as affording real evidence of complete difference of opinion between himself and his co-arbiter, and as being, in this respect, in an entirely different position from the conduct of an arbiter who, at an inchoate stage of procedure, and before using any means for forming an opinion, had simply declined to consider the case, or to state his opinion. In the latter state of the fact, it would be difficult to see how the case of a difference of opinion between the arbiters (which means a difference between two arbitral opinions) had ever emerged.

360. In the case of Rigg,[1] Bankton states that "the recital of the decree (arbitral) pronounced by the oversman, with concourse of one of the two arbiters, bearing that the arbiters disagreed, was found a presumptive proof of it." In this instance, the fact that the arbiters had differed was supported by the joint statement of the oversman and one of the arbiters themselves. There was no counter-statement by the other arbiter; and apparently the Court had thus held the existence of the arbiters' difference in opinion to be duly established.[2]

361. It would rather appear that, shortly after the date of this case of Rigg, the Court had inclined to lay it down as a general rule, in the case of an oversman's award which narrated a difference of opinion between the arbiters, that this of itself should be held presumptive evidence of the fact so narrated, if the award was signed by the oversman and one of the arbiters, and if no counter-proof was offered.[3]

362. If the report be accurate in the subsequent case of Duns-

[1] June 1724, quoted by Bankton, 1. 23. 9.

[2] [See also Frederick *v.* Maitland and Cunningham, note 2, p. 190.]

[3] Macilhose, July 13, 1738, 5 Suppt. 204. The submission bound the parties to implement "whatever the said arbiters in one voice, or, in case of variance, any of them with John Graham, as oversman, should determine."

Kilkerran's report bears "that a separate objection was made to the decreet-arbitral, viz., that it was only signed by the oversman and one of the arbiters, and it did not appear that the arbiters had differed. As to this, when the decreet-arbitral was looked into, it bore a long narrative of the two arbiters differing. The submission also was of a singular style, viz., Whatever the said arbiters, or any one of the arbiters with the oversman, should determine, they obliged themselves to stand thereto. However, without putting the matter upon any of these specialties, Arniston, who, having begun to speak, went through the whole case, was of opinion, from one of the arbiters and the oversman signing, it was presumed the arbiters had differed, unless the same should be redargued by contrary proof; and no one was of a different opinion, and interlocutor was so pronounced: Find it presumed that there was a variance betwixt the arbiters, unless the contrary should be proven," etc.

moor,[1] an award was sustained after conflicting judgments, although it was pleaded that "it did not bear that the arbiters differed between themselves, nor was there any reference by them to the oversman." The submission bound the parties to implement "whatever the two arbiters, or, in case of variance, any one of them with the said Andrew Cochrane, oversman, should determine," etc. The successful party founded on the terms of the submission, and contended that "either the arbiters varied, and then it was the proper case for the oversman's interposition; or they agreed, and the decreet was the opinion of all the three." No opinions of the judges are given.[2]

363. In the subsequent case of Colquhoun,[3] the parties bound themselves to implement "whatever the said arbiters, or, in case of their varying in opinion, whatever they or either of them, with David Muir, oversman, shall give forth as their final sentence," etc. An award was pronounced by an oversman and one of the arbiters, which specially narrated that the arbiters had met and taken certain procedure under the submission, but, "having differed in opinion on some points," had called in the oversman; and thereafter that various meetings of the oversman and both arbiters had taken place, resulting in the award. A reduction was brought, in which the pursuer challenged the narrative in the award as false, and alleged that the arbiters had never differed in opinion, so that the oversman had interfered without a warrant. The Court, *ex proprio motu*, appointed Carse, the arbiter who had not signed the award, to be examined before the Lord Ordinary. On considering his deposition, the Court "in respect there was no written evidence that the arbiters had differed in opinion, reduced the decreet-arbitral." The defender then reclaimed, craving the Court to direct the examination of the other arbiter and the oversman, with the clerk to the submission, which the Court ordered accordingly. These witnesses stated that the arbiters had differed upon matters of essential importance before the oversman was called in by them; and that, eventually, Carse had refused to sign any opinion at all, as the oversman concurred with his co-arbiter and not with him. The Court thereon altered their former interlocutor, repelled the reasons of reduction, and sustained the award.

364. In an appeal, the pursuer of the reduction stated as his second Reason of Appeal, that "there could be no regular devolution

[1] July 30, 1745 (656).

[2] This decision seems to be the only instance of an award being sustained, which, though signed by an oversman (along with one of the arbiters), did not contain the statement, *in gremio*, that the arbiters had differed. In the case of Gordon, Nov. 30, 1716 (655), which, however, was that of an award pronounced by an oversman alone, whose office could only commence at the period when the office of the arbiters ceased, it had been decided that an award which omitted to state that the arbiters had differed, was "null, and that the nullity could not be supplied by after probation."

[3] July 27, 1784, 2 Paton, 626.

of the powers of the arbiters upon the oversman, unless by writing under the hands of both arbiters,—the common law of Scotland, as ascertained by a multiplicity of decisions, declaring that no other evidence but written evidence was admissible to prove a thing of that kind, and that the testimony of witnesses or parol evidence is wholly incompetent." The respondent maintained, in answer, that both on the general law and in the particular circumstances of the case, the said Reason of Appeal was unfounded. The House of Lords "declared that the case provided for in the submission—viz., the case of the two arbiters varying in opinion—is sufficiently established; and that thereupon, David Muir and Robert Gray (oversman and arbiter) had competent authority, according to the terms of the said submission, to give forth and pronounce a decreet-arbitral."[1]

365. This case, especially in connection with that of Macilhose,[2] appears sufficiently to instruct, that where a submission binds parties to implement whatever two arbiters, or, in the event of their variance, whatever either of them, along with an oversman, shall determine, it is not essential that any minute should be signed by the arbiters recording their difference of opinion, and consequently calling in the oversman. If the award be signed by the oversman and one of the arbiters, and specially records the fact of the arbiters having differed in opinion, the Court have apparently laid the *onus* upon any party challenging the award, to prove that no difference of opinion had, *de facto*, occurred between the arbiters, so as to warrant the oversman's being called in. Failing such proof, the award has been sustained.[3]

[1] An incidental proceeding of a remarkable character occurred in this case. On comparing the deposition of the arbiter, Carse, whom the Court, *proprio motu*, had directed to be examined, with the depositions of the other arbiter, the oversman, and the clerk to the submission, who were subsequently examined, the Court (after citing Carse to the bar, and hearing him by his counsel) found that Carse had committed gross prevarication and concealment of the truth upon oath. They therefore ordained him to be imprisoned from 17th December 1783, the date of the sentence, to 14th January 1784, and to be then set for an hour in the pillory at the market-cross of Edinburgh; and they adjudged him to be infamous, and incapable of public trust. On an appeal by Carse, the House of Lords reversed the sentence, except in so far as regarded his imprisonment. See Books of Council and Session, under the dates of 17th December 1783 and 10th August 1784. See also Appeal papers in Advocates' Library.

[2] *Supra*, 193, note 3.

[3] In connection with this subject, the case of M'Callum, which was affirmed in the House of Lords, May 23, 1826, 2 W. & S. 344, may be noticed. The submission was to three arbiters, and, in case of their differing in opinion, to any two of them. An award was pronounced by two, which, *inter alia*, narrated expressly that the third had differed in opinion from them. In a reduction of the award, one of the reasons was, that as there was no evidence under the hand of the third arbiter himself, that he had differed in opinion, that fact was not duly instructed; and if so, the award, pronounced by only two, could not stand. The Court of Session repelled the reason of reduction, and sustained the award. The House of Lords affirmed.

This case, however, is distinguished from those of Macilhose and Colquhoun, by

366. In another case, though perhaps of a somewhat special nature, it seems difficult to say that there was anything but presumptive evidence, arising from the procedure under the submission, to support the oversman's narrative in his award, that the arbiters had differed in opinion. Nevertheless, the objection of the want of evidence of the arbiters' difference of opinion, was repelled. It was a case regarding the settlement of boundaries. The minutes in the submission were the work of unprofessional men; and the Court were avowedly desirous to save the award "from being got the better of, on critical forms." The two arbiters had met on the ground, and then executed a nomination of an oversman. It neither contained words of devolution, nor a statement that the arbiters had differed in opinion. A few days thereafter, the oversman and one of the arbiters appointed a clerk to the submission; and on the same day the award was written out, expressly narrating that the arbiters had appointed him, in respect they could not agree in opinion. In a suspension of a charge upon the award, the Lord Ordinary repelled the reasons of suspension, "in respect that the decreet-arbitral charged on does bear that the arbiters could not agree in the decision to be pronounced, and had chosen an oversman." The Court adhered.[1] It will be observed that this is an instance of an award which, as in the case of Middleton, was signed by an oversman alone.

367. It is perhaps unnecessary again to repeat, that, although these decisions certainly seem to show that it is not always essential to have a minute, signed by both arbiters, narrating their difference of opinion, before an oversman may be legitimately called in, it never can be safe or expedient, and will often be found fatal, to omit such a step of procedure. In the case of a submission to three co-arbiters, with power to a majority to decide, no such minute is necessary, because the legitimate right of every one of the arbiters to act is complete from the first, and needs no aid from such a minute. But even where the submission contemplates an award by two arbiters, and, on their differing, an award by an "oversman," along with either of them, a minute under the hand of the arbiters, narrating that they have differed, and therefore have called in the "oversman" to act along

the important specialty, that it was a reference to three co-arbiters, with power to the majority to determine. In the two former cases, the reference was primarily to two arbiters, as the *forum prædilectum*; and it was only in the event of their variance in opinion, that any case arose which admitted of the oversman's being called in. In M'Callum's case, on the contrary, all the three arbiters were alike entitled to act from the first; and the sole question was, whether there was evidence that the third arbiter, who did not sign the award, differed from his co-arbiters, who signed it. In such a state of the facts, the argument which, as above quoted, was successfully used in the case of Dunsmoor, would seem to apply more legitimately than it did in that case. See sec. 362.

[1] Gardner, Jan. 19, 1773 (659).

with them, should always be made.[1] Although, in such a case, the "oversman," after he has been called in, seems scarcely to be distinguishable from a mere third arbiter; yet, before any power legitimately exists under the submission to call him in, a difference of opinion (arbitral opinion) must have occurred between the two arbiters. And the appropriate proof of this having taken place is the execution of a minute, signed by both arbiters. No other procedure should be relied on. With regard, again, to that class of submissions in which there is a proper "oversman," who does not act along with the arbiters, but only in consequence of a devolution of the submission upon him, which simultaneously terminates the office of the arbiters themselves, a minute declaring a difference of opinion, and therefore devolving on the oversman, appears to be so important, that, notwithstanding the cases of Middleton and Gardner, the omission of such a minute is likely to imperil the whole procedure.

368. It has been noticed,[2] that the act of nomination of an oversman by arbiters, in the outset of a submission, has not the effect of devolving the submission upon him. But if the act of nomination be made at a later stage, after the arbiters have formed their opinions and disagreed, and if it narrates their difference of opinion as the reason why they execute the nomination, it would appear to authorise the oversman to act, although it contained no express words of proper devolution.[3] In the actual circumstances, the nomination of the oversman could have no other object than that of devolving the submission upon him. And certainly, if the nomination was followed by the arbiters withdrawing from further interference in the submission, and by the oversman's acting as such without any objection being made at the time, no objection could, at a later stage, be taken to the absence of express words of devolution in the minute which nominated the oversman. Its meaning has then been conclusively construed by the conduct of the parties, as importing an actual devolution of the submission upon him.[4]

[1] In Campbell, Jan. 31, 1812 (not reported), an oversman's award was challenged by a suspender, who alleged that the arbiters had never differed in opinion, and offered to prove this by the oaths of both the arbiters. It appeared that there was extant a minute of devolution, signed by both the arbiters, and expressly narrating that they had differed in opinion. The Court unanimously held the offered proof to be incompetent.—Excerpt from L. Pres. Boyle's Note-book; Park. Syn. xvii. 55.

[2] *Supra*, sec. 340.

[3] See an instance of this kind of nomination in MacNair, Feb. 16, 1855, 17 D. 445. It seems probable that in a large class of the less formal submissions, in which professional assistance is not resorted to, the devolution takes place under a minute similar to this.

[4] See law of England, as to the effect of the actings of the parties in barring them from afterwards objecting to the authority of an umpire.—Russ. 195, [4th ed., 186].

369. An act of devolution is, in its own nature, entirely distinct from an act of prorogation, and neither of these acts includes the other. Accordingly, when a devolution of the submission upon an oversman is executed, that act neither prolongs nor abridges the term of the submission which was current at the time. Unless, therefore, a prorogation shall be made by the oversman, before the lapse of that term, the submission will fall on the same day on which it would have fallen if no devolution had taken place.[1]

370. In a recent case, which related to a submission of a less formal character, which was entered into for the purpose of valuing a quantity of coals left on a coal-hill by an outgoing tenant, an award by an oversman was challenged on various grounds, one of which related to the minute appointing him to act as oversman. The pursuer alleged that the oversman had made an inspection of the coals, and had resolved on what his award was to be, before any written minute of nomination in his favour had been executed. The Court, in so far as they had occasion to advert to this subject, were understood to consider that it involved matter of great delicacy, which required to be jealously scrutinised; but that, if the procedure had been taken *bona fide*, and if the party, after being informed that he was selected as oversman, had impartially made the inspection in question, and had not indicated his opinion to any one, the mere circumstance that the written minute of appointment was not executed until after he had made the inspection and formed his opinion was not in itself enough to invalidate his award.[2]

371. Where there were four arbiters, and the nomination of an oversman was executed by only two, the Court held the nomination inept; "for, if two had the power, then, by the same rule, the other two might have as well chosen another oversman."[3]

372. Where arbiters have not received power to pronounce part-awards, and where they cannot agree in an award disposing of the whole matters submitted, the devolution executed by them will neces-

[1] On 22d November 1814, a prorogation was executed by arbiters "to the day of next." The arbiters thereafter differed, and, on 11th July 1815, "nominated and appointed (A. B.) oversman for determining the whole matters submitted," etc. The oversman executed no prorogation. He pronounced his award on 4th July 1816. The Court reduced the award, as having been pronounced after the submission had fallen, by the lapse of a year from 22d November 1814, "being clear that a devolution could not be held to imply a prorogation.—Thomson, Jan. 28, 1818, F. C.

[2] MacNair, Feb. 16, 1855, 17 D. 445. Both the minute of appointment of the oversman, and the oversman's award, were dated on the same day. It is, perhaps, unnecessary to add, that the procedure, in so far as regards the mode of executing the minute of devolution, is not indicated by this judgment as either eligible in itself, or such as could be held a safe precedent under any circumstances, which were not identically the same with those alleged by the defender.

[3] Watson, Nov. 18, 1696 (648).

sarily be of the whole submission.[1] Where the arbiters, under the powers conferred on them, have pronounced one or more part-awards, the devolution will include all that remains undecided by them.

373. Great care should be taken that any matters which the arbiters do not themselves decide should be well devolved by them upon the oversman; so that, by his award, coupled with any part-awards made by themselves, the whole submission may be exhausted. It would, indeed, appear that the entire subsequent procedure would be liable to fatal challenge, if the arbiters omitted to devolve upon the oversman anything that was not decided by themselves;[2] for, even where the power of pronouncing part-awards is given, both to the arbiters and to the oversman, it still appears to be an inherent condition of the contract, that the whole submission which was before the arbiters, shall (so far as not decided by them) be laid before the oversman; so that, if he shall eventually decide only some portion of it, as by a part-award, this may result from his exercising judicially the power to that effect, which is bestowed upon him by the contract of submission, and may not be caused by the utterly unauthorised contingency of a portion of the submission having been absolutely withdrawn from his cognisance, either by the act or by the neglect of the arbiters in not devolving it upon him.

374. It was the plain wish and intention of the parties that the whole subject of the submission should, in the first place, go before the arbiters for judgment; and that the whole, so far as not decided by the arbiters, should next go before the oversman. In no other way would it be possible to exhaust the submission. It was in reliance upon this, and to carry out this, that they framed their contract of submission. And if, nevertheless, the arbiters could competently reserve any part of the subjects submitted, and neither decide it themselves nor yet devolve it on the oversman, there does not appear to be any rule or principle for determining to what extent they might

[1] It may be noticed here, that in disposing of the case of Lang, L. Cranworth, C., referred to a peculiar species of submission, in which arbiters were expressly empowered, from time to time, to devolve part of the disputed matters upon the oversman, while the rest remained with themselves, and they proceeded to deal with such remaining parts, concurrently with the oversman, who dealt with the parts devolved on him. "Parties may also stipulate, if they think fit, that the arbitrators may, from time to time, as they differ, refer each subject or point to the oversman, retaining concurrently their jurisdiction over each subject. That is likely to be, in ordinary cases, very inconvenient, because, without saying that it is absolutely illegal, a concurrent jurisdiction, to be exercised over a part of a subject-matter by one tribunal, and over another part of a subject-matter by another tribunal, must be attended with very great difficulties. But I believe that it is a course which is sometimes adopted, particularly with regard to great railway contracts, upon which questions are arising from day to day."—See Lang, May 8, 1855, 2 Macq. 96. The doctrine of the text refers to the case of the ordinary submission.

[2] Runciman, May 24, 1831, 9 S. 629. See also Lang, *infra*, sec. 376.

not carry such a proceeding; in other words, to what extent they might throw subjects out of the submission altogether, and so make a new contract of submission for the parties, such as they had not made for themselves. A part-devolution, therefore, of what remains undecided by the arbiters, appears to be inherently inept, and *ultra vires.*

375. All the procedure by the oversman, which might take place under such a part-devolution, would thus appear to be liable to fatal challenge, inasmuch as he had never been duly authorised to act by any valid devolution. But if the arbiters, under powers in the submission, had themselves executed part-awards before devolving, these part-awards would appear to be valid, inasmuch as they had been pronounced consistently with the authority conferred on the arbiters, and at a date which was prior to their having acted irregularly, or gone out of the submission.

376. In a recent case, in which arbiters devolved part of a submission on an oversman, they were found to have failed in making an effectual award on the other part of the submission, which they had reserved to themselves, intending to decide it, as they were agreed in opinion regarding it. This miscarriage by the arbiters proved fatal to the whole procedure, including the award which the oversman had pronounced on the portion of the matters in dispute which was devolved upon him. The oversman could receive no power to decide part of the submission, while the rest was neither decided by the arbiters nor devolved on him.[1]

[1] Lang, May 8, 1855, 2 Macq. 93. The result was there brought about, in consequence of the arbiters having omitted to pronounce an award upon that part of the submission respecting which they were agreed, until after they had devolved and become *functi officio.*

There was one point of considerable importance in the law of devolution, which was argued, but not decided, in the case of Lang; and perhaps a few observations regarding it may not here be out of place.

The case stood in this position:—The arbiters having agreed as to part of the matters submitted, and having made signed notes, which distinctly set forth their opinion on these matters, devolved the submission, *quoad ultra*, upon the oversman. The devolution was executed on the 16th November 1846. The last prorogation by the arbiters had been made on 20th December 1845. The oversman executed a prorogation on 18th December 1846. The arbiters executed their award on 28th May 1847; and the oversman afterwards executed his own award, within a year from his own prorogation. It was held that the oversman's act of prorogation was necessarily limited to the matters which were devolved upon himself, and could have no further effect; from which it followed that, *quoad* the arbiters, the submission had, in every view, fallen before they executed their award, because more than a year had elapsed subsequently to their own act of prorogation.

But a separate point was considered, though not decided, which was, Whether —supposing the arbiters to have executed their award within the year after their own prorogation, but subsequently to their act of devolution—they were still to be held, by the conception of the submission, as having become entirely *functi* by the

CHAPTER VIII.

POWER OF ARBITER IN REGARD TO THE RENUNCIATION OF HIS OFFICE.

377. THOUGH the *acceptance* of the office of arbiter be purely voluntary and discretionary, the office cannot, after acceptance, be

devolution, though only of part of the subjects submitted; so that their award was necessarily reducible?

It is humbly thought that, by the devolution, the arbiters were immediately *functi*, and that any opposite view would tend to introduce confusion, by upsetting well-established principles in the law of arbitration.

(1.) If the arbiters were not *functi* by the act of devolution, it follows that, *quoad* the points remaining with themselves, they were still possessed in the fullest measure of their original character and office as arbiters, and of every power inherent in that office. This, in fact, is merely a statement, in other language, that the arbiters were not *functi*.

(2.) They necessarily, therefore, had full power to reconsider their notes as to the points on which they had agreed in opinion before devolving.[1] They had power, and it was their duty, to order further proof, or further hearing on the subject, if they should think it expedient, either from *res noviter veniens*, or otherwise. They were both entitled and bound to alter their views, if they should come conscientiously to change their opinion; and, moreover, it was their duty to prorogate the submission from time to time, if they found this requisite, before finally executing their award. All these powers result inevitably from the hypothesis, that the arbiters were not *functi* by their act of devolution.

(3.) From this it follows, that arbiters might possibly proceed, prorogating the submission from time to time, before themselves, even after the oversman had entered on the submission, so far as devolved on him; nay, after he might even have made an award, deciding everything devolved on him. And, in any event, there would be two independent submissions, made out of one: the arbiters going on separately by themselves, prorogating the submission before themselves, on the one hand; and the oversman going on, separately by himself, prorogating the submission before him, on the other. This proceeding would be emphatically contrary to the view expressed by L. Wood, in the case of Lang, when his Lordship observed: "It is not contemplated that the proceedings may be divided into two parts, with co-existing powers in the arbiters and oversman; on the contrary, the view is, that the powers of the one are to end whenever those of the other commence."—Lang, Nov. 23, 1852, 15 D. 40. In this opinion many of the other Judges concurred, and L. Cranworth, in the House of Lords, intimated his approbation of it.—2 Macq. 102.

(4.) But, further, it might well happen that this additional discussion before the arbiters should produce a variation between them respecting the points on which they had previously agreed. In such a case, they could not themselves pronounce any award at all. And either these points must then remain absolutely undisposed of, under the submission, or else the arbiters would require to be able to make a new and subsidiary devolution upon the oversman, who might, in the meantime

---

[1] "On that question I entertain no doubt. Notes by an arbiter are never final."—Per L. J. C. Hope, in Lang, Nov. 23, 1852, 15 D. 52. See also Ramsay, June 20, 1783 (653), and Hailes' Dec. 912; Gray, July 8, 1831, 5 W. & S. 305.

renounced at the pleasure of the arbiter. By the act of acceptance arbiters undertake towards the parties the duty of proceeding with reasonable diligence in the execution of their office (unless some ground of legal excuse shall intervene), until they shall either pronounce an award, or, in the case of two co-arbiters who disagree, shall demit their office, and devolve the submission on an oversman, when they have been empowered so to do.[1]

378. Formerly, there was a style of submission in use, by which an arbiter not merely "accepted in and upon him the decision" of

have not only accepted, but fulfilled his own office under the first devolution, by issuing his award.[1]

(5.) Still further, it might happen that additional discussion, or reflection, might incidentally induce an agreement of opinion in the arbiters as to those points on which they had formerly differed, and which they had devolved on the oversman. In Lang's case, one of the two points devolved on the oversman was that of the expenses of the submission. It might well be, that further reflection would induce the arbiters to agree as to this point; and if so, *quid juris?* Could the oversman still proceed, under the devolution, to deal with a point on which the arbiters had now agreed; it being a fundamental condition of the submission, that the arbiters were to form the primary tribunal, whose joint award was especially desired, if it could be had; insomuch that it was only in case of their continued disagreement in opinion, so long as they remained arbiters, that any power was given to them to devolve upon the oversman at all.

It would appear, therefore, that the law of arbitration would be exposed to dangerous anomalies, if it were held that, under the ordinary form of the contract of submission, the arbiters who execute a devolution (whether in whole or in part of the matters submitted), are not thereby entirely *functi*. Nor is there any hardship imposed on arbiters in enforcing this rule, as they would merely require to follow "the usual course, viz., to exhaust the submission so far as they are agreed by an interim decree, if they have power to pronounce one, and devolve the submission *quoad ultra;* or else, if they have no such power, in respect of their differing in opinion, to devolve the whole matters submitted on the oversman. In either way, the connection of the arbiters with the submission ceases from the date of the devolution."[2]

By following this rule, both the principles and the practice of the law of arbitration would seem to be fully protected. It is apprehended, that if the opinions in the case of Lang (which embraced various points of discussion) be analysed, a devolution, even of part only of the matters submitted, was held by L. President M'Neill, and Lords Fullerton, Medwyn, Murray, Ivory, Wood, Rutherfurd, Cowan, and Anderson, to render the arbiters wholly *functi*, under the ordinary submission.

[1] Balfour's Pract., 413, c. 7 and 10; Spottiswoode's Pract., 14; Spottiswoode's Styles, 378; 1 Bankt. 23. 15, and 4. 45. 132; Marshall, Mar. 26, 1853, 15 D. 603.

In England the law is otherwise. "Though the arbitrator has taken on himself the burden of the reference, and held several meetings, but not closed the case, he may decline to go further with the arbitration, and the Courts have no jurisdiction to compel him to proceed."—Russ. 202, [4th ed., 193].

---

[1] "If arbiters continue to act after a devolution, they may differ a second time, and so raise a necessity for a second devolution," etc.—Per L. Anderson, in Lang, Nov. 23, 1852, 15 D. 59. And if there might be a second devolution, there might equally be a third, etc.

[2] Per L. Cowan, in Lang, Nov. 23, 1852, 15 D. 57.

the matters submitted, "and faithfully promised to meet and treat thereupon, and pronounce, give forth, and deliver his final sentence and decreet-arbitral therein," on or before a certain day; but also consented to the registration of the submission, subscribed by him, in order that summary compulsitors might be available against him, to compel implement of it.[1] And there are instances in which the Court granted letters of horning against an arbiter, not indeed to charge him to give forth any particular sentence, but to give forth a sentence, according to his own conscientious opinion upon the matters submitted.[2]

379. The style of the submission is now altered, so that the use of diligence against a recalcitrant arbiter can no longer be summarily resorted to. But, in the event of a sole arbiter attempting to renounce his office without adequate cause, an ordinary action against him will lie, at the instance of either of the parties, to the effect of having it declared "that he is bound to proceed with the said submission, and to decide upon, and bring to a final conclusion, the matters thereby submitted to him, by issuing a formal decree-arbitral, in such terms, and at such time, as to the said arbiter may seem right;" and that the pursuer of said action is, "in the premises, entitled to enforce the obligations undertaken by the defender, as arbiter."

[1] Dallas' Styles, 814. See Mackenzie's view of the diligence which might be used against an arbiter, to compel him to give forth an award: Inst. 4. 3. 8. See also Spottiswoode's Styles, 374 and 377, where the arbiter, in accepting, is made to promise that he shall pronounce his decree-arbitral, "and insert the same in the subscribed blank, upon the back hereof, betwixt and the day of , without longer delay."

[2] Jerviswoode, Dec. 4, 1702 (9435). Fountainhall reports that, in a submission to four arbiters, "with this express quality, that no decreet-arbitral should follow thereupon, unless all the four agreed," the arbiters "having gone through the whole articles, and by signed minutes and interlocutors having agreed thereon," a decreet was extended on the back of the submission. This was signed by three of the arbiters; but the fourth, Sir William Bruce, declined to subscribe it. Thereon a bill was presented, "craving letters of horning to charge Sir William to give forth his sentence and determination in the case." "The Lords considered, from the title in the Roman law *de receptis*, and by our pratique, arbiters might be compelled, *ut sententiam dicant*, when they had once accepted, and that there was not *locus pœnitentiæ*; but the law could not compel Sir William to concur with the other three in their sentiment, but only to give out his determination, as he was persuaded to be just in his own conscience: so the Lords granted letters of horning against him to this effect, that he might give his opinion as to the claim and controverted points, but nowise to oblige him to join with the other three in their decision, unless he thought it just."

Erskine states that formerly summary diligence by horning could have been raised against arbiters, to compel them "to pronounce sentence" (4. 3. 30). He then expresses a doubt, whether, from the change of style of the submission, it was not now in the power of an arbiter to renounce his office *quandocunque*. This doubt, it will immediately be seen, from the case of Marshall, is not well founded.

380. This was held in a recent case, in which an arbiter, after having proceeded a certain length with a submission, took the step of renouncing his office, inasmuch as "the proceedings are likely to require a great deal of his time and attention, and more than he can afford to devote to such a business." He, at the same time, reserved "to himself the power to act, should he be compelled to do so." The Court unanimously held that he had assigned no sufficient cause for renouncing his office; and found him bound to proceed with the submission, till he gave forth a decreet-arbitral, as concluded for in the terms above quoted.[1]

[1] Marshall, Mar. 26, 1853, 15 D. 603. On completing the Glasgow tunnel on the Edinburgh and Glasgow Railway, a submission was entered into between the contractor (Marshall) and the Railway Company, to John Miller, civil engineer, pursuant to a clause of submission, forming part of the contract. Miller accepted, and proceeded to investigate the matters in issue between the parties. He gave out notes of opinion, and pronounced a finding, in terms of his notes. On considering a representation, he intimated that he was not disposed to proceed further in the submission; and subsequently, after hearing the arguments of parties on his power to renounce, he formally renounced the submission. He assigned for reason, "that the proceedings in it are likely to require a great deal of his time and attention, and more than he can afford to devote to such a business." He, at the same time, reserved to himself "the power to act, should he be compelled to do so."

The Railway Company raised an action against the arbiter and the other party, Marshall, concluding to have it declared, 1st, "That the said John Miller has not validly renounced the submission libelled, made to, and accepted by him; and that the said John Miller is bound to proceed with the said submission, and to decide upon, and bring to a final conclusion, the matters thereby submitted to him, by issuing a formal decreet-arbitral, in such terms, and at such time, as to the said arbiter may seem right;" and 2d, "That the pursuers are, in the premises, entitled to enforce the obligations undertaken by the said John Miller, defender, as arbiter foresaid."

Miller pleaded that he had acted, not capriciously, but on grounds satisfactory to his own mind; and that when an arbiter found himself called upon to make an unreasonable sacrifice of his time and attention in performing his office, he was entitled to renounce it. But he added, that if the Court should hold him bound to act, he was ready "to do so, to the best of his ability."

The contractor, Marshall, pleaded that Miller had a right to renounce office at pleasure, or at least for any reason satisfactory to his own mind and conscience; and, moreover, that, having already expressly renounced, he could not now resume his functions.

The Railway Company maintained that, without the consent of both parties, the submission could not be renounced, except "*causa cognita*, to the satisfaction of the Court;" and that Miller's very general statement of personal inconvenience was quite inadequate to warrant him in renouncing, after the parties had mutually excluded themselves, for a time, from recourse to Courts of law, and had otherwise acted in reliance on his carrying out the submission.

The L. O., Ivory, found and declared *simpliciter* in terms of the libel, and decerned.

Marshall reclaimed. The Court unanimously adhered. L. Pres. Boyle observed: "I do not think a person who accepts the office of arbiter is entitled capriciously to lay it down. That is neither in accordance with the Roman law, nor with the law of Scotland. He undertook a duty, and he was bound to perform it, faithfully and

381. What shall be considered a sufficient cause to justify an arbiter's renunciation of his office does not appear to be susceptible of very precise definition.[1] In the case of Marshall just referred to, it

honestly. That this was the case under the old form, when the arbiter was a party to the deed of submission, and to the clause of registration contained in it, there can be no doubt. Then, if that be so, the principle is the same, although the mode of enforcing performance is out of fashion. The arbiter may have good reasons for declining to proceed,—such as ill-health, an intention of going abroad for a long time, or an emerging interest of his own. But where he gives no reason for not going on, except his mere will, the Court must judge of the validity of his reasons." His Lordship added, that, in the actual case, he "had no difficulty in holding that it is incumbent on the arbiter to go on and perform his duty, and that he has no sufficient reason for declining to do so;" and further, that the circumstance of one of the parties-submitters having "backed the arbiter in his excuse," did not make the excuse itself any better.

His Lordship likewise observed: "How our decree could be enforced against a recalcitrating arbiter, I do not say. There is no such question here, as Mr. Miller says he is willing to go on, if that should be held to be his duty."

L. Fullerton stated that he felt no difficulty; and added: "Both on theoretical and practical principles, I think the action to compel the arbiter to go on is competent. The arbiter is bound to follow out the submission, if he has accepted it. No doubt, he cannot be compelled by a charge proceeding on the clause of registration, for the arbiter is not a party to the deed of submission. But the obligation is clearly a binding obligation upon the arbiter. The consequences of allowing an arbiter, who has accepted office, to throw it up at his own caprice, might be most disastrous. By undertaking the submission, he prevented the parties from following out their remedy in the ordinary form. It is needless to go into any question as to the practical difficulties; I don't think any such will arise. The question is, What is the law of Scotland? There can be no doubt what it was under the old form; and I do not think that the decision in the case of Chiesly is sufficient to alter it. The question there was as to the mode of enforcing the obligation; and it does not follow that, because the parties are not entitled to summary diligence against the arbiter, the whole principles of the law are abrogated and set aside. I have no difficulty in holding that the arbiter is bound to proceed."

The other Judges concurred.

In the case of Chiesly, to which L. Fullerton referred, it is reported that "the Lords considered, if there had been a clause of registration, he (the arbiter) might have been charged with horning to meet and determine; but this being omitted, the Lords refused to interpose in this case, or supply the defect." But this case was decided June 30, 1699 (632), and so was anterior to Jerviswoode, quoted *supra*, sec. 378, and also to Skeen, July 6, 1708 (9436). See also Cairncross, Feb. 8, 1704 (632).

By the Roman law, an arbiter, after voluntarily accepting the office, was compellible to execute it, unless he could assign a sufficient cause for renouncing it. "Arbitrii recepti effectus est, quod arbiter cogatur sententiam ferre." "Finge enim, post causam jam semel atque iterum tractatam, post nudata utriusque intima, et secreta negotii aperta, etc., arbitrum nolle sententiam dicere, quisquamne potest negare, æquissimum fore, prætorem interponere se, ut officium quod in se recepit, impleret?"—Voet ad Pand., L. 4, t. 8, sec. 14.

[1] Among the causes which, in the Roman law, were held to authorise an arbiter to renounce his office, were the following: "Litigantium protervia et inconstantia; vitium in compromisso; inimicitiæ capitales inter arbitrum et alterutrum litigantium subnatæ; senectus; munus in republica suscipiendum; cessio bonorum, ab

was held, on the one hand, that he was not entitled to resign at his own mere pleasure, or, apparently, for his own mere ordinary convenience; and on the other hand, it was observed by L. President Boyle, that "the arbiter may have good reasons for declining to proceed,—such as ill-health, an intention of going abroad for a long time, or an emerging interest of his own." And L. Cuninghame further observed: "What shall be deemed a sufficient cause, must clearly depend on the specialties of each particular case; and the Court will not probably scan the objections (of the arbiter) critically when they occur; as the leaning of the law must always be, to liberate a conscientious man from a duty which he feels, on reasons satisfactory to himself, that he cannot discharge with propriety."[1]

alterutro litigantium facta; pœna commissa; transactio; interitus hominis vel rei, de quibus litigatur; mors vel furor compromittentis."—Hein. ad Pand., L. 4, t. 8, sec. 540.

So likewise, "occupatio negotiorum propriorum," etc.; "et si qua alia incommoditas ei post arbitrium susceptum incidat."—Pothier ad Pand., L. 4, t. 8. sec. iv., art. 1 (26). Also, "adversa valetudo;" "profectio urgens;" or if the arbiter was "infamatus a litigatoribus;" to which Voet adds, "aut si alia similis justa excusationis causa superveniat."—Ad Pand., L. 4, t. 8, sec. 21.

[1] In connection with this subject, the case of Millie, July 7, 1796, F. C., requires attention, both as to its own proper merits, and as to the special conclusions of the summons. It has sometimes been referred to, as warranting a larger discretionary power in an arbiter to renounce a submission than it ever truly sanctioned; and this is more especially apparent after the case of Marshall.

Mrs. Millie or Whyte, one out of several children, had not discharged her legitim, or her claim against her father, Millie, senior, arising out of her interest in the succession of her predeceased mother. Millie, senior, who was stated to have realised a large fortune, chiefly moveable, executed a deed in favour of his son, Millie, junior, purporting to be an irrevocable general conveyance in his favour, *de presenti*, under burden of some small provision in favour of Mrs. Millie or Whyte. Millie, senior, put this deed upon record as a delivered deed, in his own lifetime. But, after his death, in a protracted and arduous litigation, it was held that this deed, notwithstanding its form and tenor, was a collusive device, for the purpose of defeating the legitim; and that it was, therefore, no effectual bar to Mrs. Millie or Whyte's claim of legitim.—See Millie, June 7, 1803, F. C., Affd. March 18, 1807, F. C. Appendix.

On the death of Millie, senior, and while yet the question above mentioned had not been raised in Court, a submission was entered into by Mrs. Millie or Whyte and her brother, to Mr. Fergus of Strathore and Mr. George Heggie, as arbiters, to determine what sum her brother should pay to her, as "fair and reasonable," for a discharge of all her claims through the death of her father and mother. In the discussion before the arbiters, the above deed by Millie, senior, was founded on by Millie, junior, as effectual to exclude his sister's claim of legitim. The arbiters took the opinion of Mr. Rolland, advocate, 1st, as to the legal right of Mrs. Millie or Whyte, supposing her father to have died intestate; and, 2d, as to the effect of her father's deed upon his succession, and particularly in excluding the legitim. On the second point, Mr. Rolland's opinion indicated much doubt and difficulty, so as to afford no authoritative guide to the arbiters on the subject. In these circumstances, Fergus intimated that he could not conscientiously take upon himself to decide what sum should be awarded to Mrs. Millie or Whyte, as that necessarily involved the determination of a point of law of great difficulty, and which seemed

382. Although only one of the parties insisted in the action for compelling the arbiter to proceed, in Marshall's case, while the other party, as well as the arbiter himself, lodged defences, the Court had

only proper for the determination of a Court of law; especially as eminent counsel had been unable to offer any clear advice for guidance. He also stated, that he had been originally induced to accept the submission, on the representation that a mere family difference had arisen between near relations, which admitted of being adjusted on equitable considerations; and as the case had unexpectedly proved to be so different from this, he could not, in conscience, proceed to give a judgment in it as he was unable to ascertain where the justice of the case lay.

An action was then brought against Fergus, by Mrs. Millie or Whyte and her husband, concluding to have Fergus decerned and ordained "to proceed in determining the said submission, either jointly with the said George Heggie, or, in case of their differing in opinion, to concur in naming an oversman."

Fergus, besides maintaining, on the merits, that he had stated a reasonable and sufficient cause for declining to proceed in the submission, since he could not conscientiously undertake to form an opinion and give judgment disposing of the rights submitted, also contended, with reference to the special conclusions of the summons, that they were untenable. Because he could neither be compelled to concur with his co-arbiter in pronouncing an award, if they conscientiously differed in opinion, nor yet in selecting an oversman, if they conscientiously disagreed in their choice.

The report gives no detail of the opinions of the Judges, but bears that they unanimously assoilzied the defender.

It seems evident that this was a case of a very special nature. In place of a family dispute, which admitted of being disposed of on equitable considerations, it turned out that the submission involved the decision of a point of law so difficult, that counsel of great eminence proved unable to express a clear opinion regarding it. When an arbiter, in these circumstances, conscientiously considered that he could not decide the case satisfactorily to his own mind, and that it should be left for the determination of a Court of law, it would have been a very strong thing to subject him to legal compulsitor, in order to force him to give an award.

The conclusion of the report states that "the Court, without entering into the question how far a sole arbiter is bound to decide, were clear, on the grounds stated by the defender, that, against one of two arbiters, the conclusions of the action were ill founded."

It may be remarked, however, that the obligation which attaches to each of two co-arbiters, is precisely the same, in kind, with that which attaches to a sole arbiter, viz., that of *bona fide* performing the office which he has undertaken to perform. And, therefore, especially after the case of Marshall, it may probably be expected, that if conclusions, analogous (*applicando singula singulis*) to those in that case, were brought against one of two co-arbiters, who capriciously sought to shake off the submission, the action might be sustained, and decree pronounced against such an arbiter; just as happened in the case of Marshall with a sole arbiter.

The conclusions would require, however, to be modified, probably praying to have the arbiter ordained to proceed with the submission—to form an opinion on the matters submitted—and, in the event of his agreeing with the opinion of his co-arbiter, to concur with him in pronouncing an award in conformity therewith; otherwise, to concur in devolving the submission on the oversman. Where an oversman had been named in the submission, or appointed by the arbiters at the outset, the conclusion as to devolving would present no difficulty. But where an oversman yet remained to be appointed by the joint act of the arbiters, the conclu-

no difficulty in holding the title of the one party, pursuer, to be sufficient.

383. In this case, the arbiter intimated his willingness to proceed in the performance of his office, if the Court should hold him bound to do so. There was thus no occasion to consider what mode of compulsitor should be resorted to, in order to compel a recusant arbiter to satisfy the obligation which he had undertaken towards the parties to the submission. But the L. President observed, that the obligation of the arbiter remained the same now, as it formerly was, at the time when it was the practice for the arbiter to be, himself, a party "to the deed of submission, and to the clause of registration;" and that "the principle is the same, although the mode of enforcing performance is out of fashion."[1] From this it might apparently be inferred that, although summary diligence cannot of course be used, where there is no clause of registration affecting the arbiter; yet, if a decree should be pronounced by the Court, in an ordinary action, declaring his obligations (which consist *in facto proprio*), and decerning and ordaining him to perform them, there should be room for applying the ordinary compulsitors, *ad factum prestandum*, as in any other analogous case.[2] But the question is one of delicacy and difficulty, which, it may be hoped, is not likely soon to require a determination from the Court.

384. It is true that, especially in the case of two co-arbiters, the

sions, in regard to that subject, would require to be shaped in modified terms, the precise tenor of which it might be premature to enter upon, until after some case shall have actually occurred in which the subject is sifted in forensic discussion, and stamped by the determination of the Court.

[1] In the Roman law, various compulsitors might be applied. "Arbiter vero cogendus est, captis pignoribus, indictâ mulctâ, aliisque similibus modis, quibus vulgo quisque ad oneris suscepti implementum constringi potest: præcipue vero, condemnatione in id quod interest."—Voet ad Pand., L. 4, t. 8, sec 14. In connection with this subject, the following remarkable practice is recorded by Voet, which seems, perhaps, to have some connection with the origin of the English practice, of rigorously enclosing juries until they agreed on a verdict:—"Nec silentio hic involvenda, illa peculiaris cogendi ratio, quæ Anglis Belgisque, inter alias conditiones pacis placuit, ut nempe arbitri, litibus quibusdam dijudicandis, ab utrâque gente electi, si non intra certum tempus eas definierint, conclavi includentur, ab omni hominum consortio segregati, ibique sine lumine, sine cibo potuque, aut apparatu alio quocunque, tamdiu agant, donec, sententiâ suâ, commissas sibi terminarunt quæstiones."

[2] See also, on this subject, the case of Thallon, November 22, 1855, 18 D. 80. In that case, a party brought an action in Court, claiming certain additional damages beyond what had been allowed in a previous submission between the parties, and alleging that that part of his claim had not been disposed of under the submission. The Court held, that if he had any claim, he had taken a wrong course in bringing it before them, as he should have preferred it to the arbiters; and L. J. Clerk Hope observed, *inter alia*, that the award seemed to be "*ex facie* exhaustive; and if it really was not so, and on proper application, the arbiters and oversman did not take it up, they might have been compelled to do so."

procedure in a submission may sometimes become abortive, under circumstances to which no legal compulsitor has any application. For it may easily be, that after both arbiters have conscientiously formed opinions on the case, their opinions do not agree with each other, so that no award can be pronounced by them. And it is further possible (though it seems improbable), that after an earnest and conscientious endeavour to select an oversman, the arbiters cannot agree in their choice; in which event they cannot execute a devolution of the submission. But if they have thus, *bona fide*, performed both of these duties, first in forming a conscientious opinion on the case, and next in making a conscientious effort to select an oversman, they have each truly performed the whole office and duty which they undertook; and, in the actual circumstances, the submission must now prove abortive. Nor could any compulsitors of the law be ever directed against the arbiters, to enforce the performance of other or higher duties, of any kind, than those now specified.[1] The actual security of the parties, against so unfortunate a result as the abortion of any submission, under the circumstances above supposed, seems to lie in the judicious selection of reasonable and practical men as arbiters.

385. In the event of an arbiter culpably and negligently or wilfully delaying to proceed with a submission, and carrying his delay to such an extent as to be a practical refusal to execute his office, it would appear that the same compulsitors might be directed against him, to compel him duly to proceed, until he has fulfilled his whole obligation, *qua* arbiter, which have been found competent in the case of an arbiter who, without adequate cause, attempts to renounce his office.[2] Perhaps, also, an arbiter, so grossly misconducting himself, might, in some circumstances, discover that he had raised a formidable claim of damages against himself, for the culpable breach of the obligations undertaken by him towards the parties. It would, however, require an extreme case to raise these questions; and in the absence of decisions on the subject, it seems unnecessary to do more than allude to them.

[1] See Interlocutor of Court, in Jerviswoode, Dec. 4, 1702 (9435).

[2] It would appear that this was, of old, the law of Scotland. Balfour observes, that "gif the arbiteris, or ony ane of thame, quha has acceptit the compromit (submission), refusis or delayis to deliver or pronounce their decrete, they may be compellit and constrainit be ane Judge to do the samin."—*Voce* Arbitrie, c. 10, 413.

But, independently of special authority, and on the principle, that what a man cannot lawfully do by direct means, the law will not suffer him to do by mere simulate devices, it might be anticipated that, if the case should actually occur, the Court would not allow an arbiter, under the mere mask of excessive and groundless delays, practically to renounce his office.

CHAPTER IX.

POWER OF ARBITER TO ALTER HIS AWARD WHILE UNDELIVERED.

386. HOWEVER strongly an arbiter may have expressed his views in Notes, issued to the parties, or in interlocutory deliverances, it is still in his power to pronounce an award which may be at variance, in any or all respects, with his previously recorded opinions or findings. Nay, although he may have formally executed and signed an award, it is competent to him to cancel it, so long as it is neither delivered to the parties, nor put on record; and to pronounce another award, which alone shall be binding on the parties.[1] This power of cancelling an undelivered award, however, can only be exercised (like every other power of the arbiter) before the expiry of the submission.[2]

387. In such a question, the mere delivery of the signed award to the clerk of the submission, is not (in the ordinary case) equivalent to delivery to the parties. "The clerk is the servant of the arbiters and his possession is their possession." The arbiters, therefore, can still recall the award from their clerk, and cancel it.[3]

[1] MacNair, *infra*, sec. 387. A contrary opinion, by Bankton (1. 23. 22), is overruled by the cases quoted in the text.

[2] Simpson, *infra*, sec. 390. [Even a delivered award, if improbative, may be, and ought to be, recalled by the arbiter before the expiry of the submission, and a probative final award substituted for it. Bannatyne *v.* Gibson and Clark, Dec. 2, 1862, 1 Macph. 90.]

[3] MacNair, May 31, 1827, 5 S. 686, and July 8, 1831, 5 W. & S. 305.

A submission to two arbiters provided that "whatever decree or decrees, partial or total, interim or final, the said arbiters, in one voice, shall give forth and pronounce, betwixt and the day of ," etc., the "said parties oblige themselves to fulfil and perform." The arbiters executed an interim award, which was formal and tested; contained a clause of registration for execution, and was duly subscribed by them; in which they decided part of the questions submitted. This award was placed by them in the hands of the clerk to the submission, who, with their sanction, issued copies of it to the parties. The arbiters afterwards executed and signed another interim award, equally formal and probative, which narrated that they had already "pronounced and issued an interim decreet-arbitral." It also narrated the delivery of copies of the former award, to the parties, and it contained a clause of registration. Copies of this second interim award were, in like manner, issued to the parties. The clerk retained the two principal interim awards in his own hands. Afterwards, one of the parties applied to the clerk for delivery of these two deeds, which the other party opposed; and the clerk laid a memorial for instructions before the arbiters, "considering himself entirely under their direction and control in this question." The arbiters declined to give any deliverance on this application, but subscribed a minute, which found both parties liable in payment of the clerk's account, and, without specifying any reason, "declared the submission terminated."

An action was then raised, *inter alia*, to reduce the interim awards, or to declare them null and void. The Court, "in respect that the interim decreets-arbitral

388. Even where the clerk to the submission, after having received a signed interim award from the arbiters, had, with their sanction, delivered a copy of the award to each of the parties, it was held that no effectual delivery of the award had taken place, and that it might still be cancelled.[1]

389. At the same time, it will be observed, that delivery of an award may be made to the clerk of the submission under such circumstances as to make it equipollent with delivery to the parties themselves; as, for example, when the arbiters cause intimation to be made to the parties, that they have executed their final award, and placed it in the hands of the clerk to the submission, with instructions to deliver it to them. This appears to render the clerk the custodier of the award for behoof of the parties, and to be tantamount to delivery to the parties themselves.[2]

were neither put on record, nor delivered to the parties, find it unnecessary to reduce the said interim decrees, the same never having been complete or valid decrees-arbitral; but, in terms of the declaratory conclusions, find the same to be null and void, and declare the submission to be terminated, and the parties released therefrom."

On appeal, L. Lyndhurst affirmed this judgment, and observed: "By the law of Scotland, in order to render a decreet-arbitral binding, it is not sufficient that it should be drawn up in form, and signed by the arbitrators, and retained in their possession, or in the possession of their clerk; but something must be done, the decree must either be delivered, or entered on record, or some authority at least must be given for that purpose." "The arbitrators never directed the clerk to deliver these decreets-arbitral, never agreed to deliver them; nor was the clerk directed to put them on record. They never agreed, therefore, that they should be complete decreets-arbitral."

The same doctrine was held in the earlier case of Robertson, June 20, 1783, F. C., and Hailes' Dec., p. 912. After arbiters had signed an award, finding one of the parties liable to the other in £3 sterling, and had delivered this to the clerk to the submission, they cancelled it, and gave judgment against the same party for £130 Scots, or £10, 16s. 8d. sterling. He presented a suspension, in respect that, by signing the first decree, and delivering it to the clerk, the arbiters were *functi*, and their subsequent decree was *ultra vires*. The Court refused the suspension, with expenses. L. Braxfield observed: "Arbiters may draw up and sign twenty decrees-arbitral, and successively cancel every one of them. An arbiter does nothing effectual, till he either delivers or registers his decreet." L. Hailes: "The clerk is the servant of the arbiter, and his possession is their possession." See also Jerviswoode, Dec. 4, 1702 (9435).

[1] MacNair, *supra*, sec. 387.

[2] In connection with this subject, the recent case of MacQuaker, Mar. 19, 1859, 21 D. 794, may be noticed. A submission was there made to two arbiters, under the "express condition," that they "shall issue their award" within ten days after acceptance of the submission. The arbiters accepted, and promptly agreed on the tenor of their award; after which, while the award was being extended for signature, one of the arbiters went on business to some distance. As soon as the award was extended, it was signed by the arbiter who remained at home and was forwarded to the arbiter who was at a distance. He received it, signed it, and posted it under an address to the clerk of the submission, for the purpose of being delivered to the parties—all within the ten days. It was

390. Where it appeared that an award had been executed by the arbiters, shortly before the expiry of the submission, and had then been placed in the clerk's hands, where it remained at the close of the

not, however, delivered to the clerk, through the post, until after the ten days had elapsed.

In these circumstances, MacQuaker, one of the parties, raised a reduction of the award, contending that, on the lapse of the ten days, the award was not fully out of the hands of the arbiters, but might still have been recalled and altered by them. It had not, therefore, been duly "issued" in the sense of the submission, as it was not delivered to the parties.

The other party answered, that the arbiters had both of them signed their completed award, and put it *in cursu* of delivery to the parties within the ten days; and further, that, by the expiry of the ten days, the arbiters lost all power to cancel or alter their signed award, which was thus final and irrevocable to all intents. The award had, accordingly, been "issued" in the sense of the submission, within the ten days.

The Court unanimously assoilzied the defender, holding that the arbiters had within the ten days, fully discharged their whole duty, and issued (or pronounced) an award which was final and irrevocable.

The Judges, while intimating that the authority of preceding cases was not interfered with, took occasion to observe that the effect of the delivery of an award by arbiters to the clerk of the submission might vary according to circumstances.

L. Pres. M'Neill, after remarking, that to "issue" the award in the sense of the submission, was in substance to "make," or "pronounce" it, observed: "The true inquiry is, whether the arbiters had fulfilled the whole matter submitted to them, within the prescribed time? Whether they had exhausted the submission? Whether they had exauctorated themselves, by giving judgment in the case? Now, it appears to me that they have done so." "It may be that a decree is in the possession of the clerk to the submission, in circumstances which will not make it the irrevocable decree of the arbiters, or a final disposal of the case; as, for example, where the arbiters themselves clearly indicated that they had made a different decree. On the other hand, it may be that the decree is in the possession of the clerk in such circumstances as to make it clear that it is a final decree." L. Ivory remarked, as to the "issuing" of the award within ten days, that it was "the arbiters' act which was to be completed within the prescribed time. It is not of the essence of his act, that the completed evidence of that act shall have reached the parties." "The only other position to be considered is, where the award has been sent to the clerk, or come into his hands. The effect of that depends upon the purpose for which it has come into his hands. If the arbiter has sent it within the time allowed for issuing the decree, and for the purpose of giving it to the parties, the clerk becomes the trustee or officer of the parties, and ceases to be the officer of the arbiters. That is issuing the decree to all intents and purposes, and more especially where it is put *in cursu* of transmission to the parties, by a medium which takes it out of the custody of the arbiter himself. I apprehend that the moment that the arbiter in this case put the decree into the post-office, it was to be held as delivered." "Generally speaking, I would say, that if all has been done, within the prescribed time, that was submitted to the arbiter, and that he intended to do, or the parties wished him to do—there being evidence of the fact—that completely exauctorates him, and makes the decree a completed instrument." L. Curriehill and Deas delivered opinions to the same effect.

Regarding the point of the delivery of an award, the following excerpt from the note-book of L. Pres. Boyle, quoted in Park. Syn. xv., No. 46, deserves attention. "Arbiters subscribed an award on the back of the submission on 13th June,

submission, the Court held that it was competent to either party to recover the document out of the clerk's hands, and to maintain it as a valid award. By the expiry of the submission, the arbiters, now *functi*, had no longer power to recall or alter the award. Even if it had been competent to lead proof that the arbiters had not placed the award in the clerk's hands for behoof of the parties, but, on the contrary, to be kept by him as an undelivered document; yet, in the absence of any such proof, the natural presumption was allowed to prevail, that the arbiters had executed the award, and placed it in the clerk's hands, for the purpose of discharging themselves of the duty which they had undertaken as arbiters, by giving a final decision upon the questions submitted to them.[1]

391. If the award be put on record, that is held to be equivalent to complete delivery, and it is no longer in the power of the arbiters either to cancel or alter it.[2]

392. It is not only within the power of an arbiter to alter his award up to the last moment before delivery to the parties (or its equivalent) has taken place; but if his opinion has undergone a change, it is his duty to make a corresponding change in his award before delivering it. He is bound to take care that the award, as delivered by him, is in actual accordance with the opinion which he finally holds, respecting the merits of the question submitted to his determination; and if it be necessary, for this purpose, to recall an undelivered award out of the hands of the clerk, and to cancel it, and execute a new award, it is the arbiter's duty to do so.[3]

393. In the case of there being two co-arbiters, it would appear to be as much within the power of either of them to recall an undelivered award,[4] to the effect of cancelling his own share therein, as it is in the

regularly proved and tested, and a copy was delivered to one of the parties, who implemented it in part, two days afterwards. On 9th August following, a new decree was subscribed, containing a slight variation, and awarding £3 of costs." In a suspension of a charge on the latter award, "the Court unanimously held that the arbiter's powers were exhausted on 13th June, and therefore suspended the charge, with full expenses."—Rowan, May 25, 1815.

The case is not reported, and the above notice is very brief. But as both parties understood the award of 13th June to be a delivered instrument, insomuch that they acted upon it, and made part implement of it, the case seems very distinguishable from that of MacNair, *supra*. If, however, it was at variance with MacNair, which was later in date, and affirmed on appeal, the authority of the latter would prevail.

[1] Simpson, Dec. 10, 1736, Elch. Arb. 2. "An arbiter, having pronounced his decreet, and put it into the hands of the clerk to the submission, cannot, after the submission is expired, cancel or alter it, but it may be recovered by exhibition." The case is also reported by C. Home (17007), who mentions that the award was pronounced only a short time before the submission expired.

[2] See *supra*, sec. 387, and cases there quoted. [3] [See also note 2, p. 210.]

[4] See opinion of L. Pitmilly, in MacNair, *supra*, sec. 387. The majority of the Court agreed with his Lordship. See also Jerviswoode, Dec. 4, 1702 (9435).

case of a sole arbiter to recall his award. So long as an arbiter is not *functus officio*, it must be free to him to exercise, according to his conscientious conviction, all the powers of his office, unconstrained by the will of any co-arbiter whatever.

CHAPTER X.

DUTY OF ARBITER TO EXHAUST THE SUBMISSION.

394. ACCORDING to the Roman law, from which the arbitration law of Scotland was so largely derived, the plea of non-exhaustion of the submission was fatal to an award.[1] The arbiter was held bound to dispose, by his award, of all the subjects submitted to him, unless he was specially empowered to pronounce part-awards. This, accordingly, appears to have been the old law of Scotland.[2]

395. It seems always to have been held clear, that when there were mutual claims submitted to an arbiter, who decided all the claims of the one party and none of the claims of the other, such an award could not stand, unless the arbiter had been specially authorised to pronounce part-awards. Because it was held to be clearly contrary to the good faith of the contract of submission, that one of the parties should get all his claims adjusted by the amicable tribunal of the arbiter, while the other party was left to seek redress in a Court of law, as to all his demands.[3]

396. It is said, however, by Erskine,[4] that our practice has in so far varied from the law of Rome, that "an award, or decree-arbitral, by which a part only of the claims submitted was determined, and the rest left open to the decision of the Judge Ordinary"—"is valid, so far as it goes."[5] Bankton inclines to hold that, without express

[1] Dig., L. 4, t. 8, sec. 19 (1); Voet ad Pand., L. 4, t. 8, sec. 18; 4 Ersk. 3. 33.

[2] "Arbiters being chosen by any parties, they are holden to decide all the differences referred to them by the compromit; otherwise, if they decern in one part, and leave the other claims undecided, it will furnish an exception to any of the parties that find themselves hurt thereby."—Halkerton, June 30, 1625 (645). See also Spottiswoode's Pract. 13 (Ed. 1706).

[3] "It can, by no just construction, be presumed to be the meaning of parties, that one of them should have the benefit of a final decision of the several claims competent to him, while the other party is left to make good every one of his by a lawsuit."—4 Ersk. 3. 33; Wishart, June 30, 1625 (17013).

[4] 4. 3. 33.

[5] There is immediately subjoined to this, in the smaller edition of Erskine, the following words: "Yet, to prevent cavilling, that power, where it is intended to be given to arbiters, is, by the present style, specially expressed in the submission." An analogous observation is also made in the larger Erskine, at the close of sec. 33. In a note on this passage of Erskine, reference is made to the three cases of Taylor,

power, arbiters cannot pronounce part-awards "in general submissions, where diverse controversies are between the parties."[1] The case referred to by Erskine scarcely seems to involve the doctrine which he has laid down.[2] It was a submission of certain particular disputes, which had a general clause annexed to the particulars. The award determined all the particulars submitted, but left a point undecided, arising under the general clause. The report is brief, and not very satisfactory; but perhaps the case may be fairly regarded as having fallen within the rule laid down by L. Kilkerran in the case of Lovat:[3] viz., that, in such a style of submission, if all the particulars are determined, the award "stands good, though there be nothing done upon the general; provided that no claim upon the general, having connection with any of the particulars determined, be left undetermined."[4]

397. It is material to observe, that, by this note, L. Kilkerran directly affirms the doctrine as undoubted, that, both in a submission of particular disputes, and in a general submission of all disputes, "the leaving anything open, voids the whole." And in regard to the third case, of a submission of "particulars with a general," Kilkerran also holds that, if any dispute, which was brought before the arbiters, was connected with the disputes particularly mentioned (though not itself actually specified amongst them), it would void the award, if such dispute was left undecided.[5]

Jan. 19, 1822, 1 S. 240; M'Kessock, Nov. 14, 1822, 2 S. 11; and MacNair, May 31, 1827, 5 S. 686. But in all these cases, there was express power to pronounce interim awards.

[1] 1 Bankt. 23. 13.

[2] Stark, Mar. 20, 1630 (6834).

[3] June 22, 1738 (625); quoted more fully, *supra*, p. 68, note 1.

[4] It should be noticed, however, that in reporting an earlier stage of the same case, Elchies gives an account of the facts somewhat at variance with that given by Kilkerran, and adds the general observation, that "some of the Lords thought, that though, in special submissions, every article must be determined, or none at all, yet that, in general submissions, some articles may be determined, and others, having no connection with them, left undecided."—Elch. Arb., No. 4. The Session papers in the Advocates' Library indicate a peculiar case, which was marked by various specialties.

In connection with this subject, it may be noticed, as illustrative of the state of practice, and the understanding of the profession, that Russell, in his "Theory of Conveyancing," p. 114 (Ed. 1788), observes: "The powers usually given to arbiters are to hear parties, receive their claims, take all manner of probation by writ, or oath of party, or otherwise, and to give forth and pronounce their final sentence and decreet-arbitral. If the submission is general, of all claims, and differences between the parties, such powers are understood to imply that all the mutual disputes must be determined, and that the arbiters cannot pronounce a sentence in part. To remedy this, it has often been usual to insert a particular clause, to enable the arbiters to give one or more decreets, according to circumstances."

[5] [In the narrow case of Paul *v.* Henderson, March 15, 1867, 5 Macph. 613, it was held by five out of seven judges (Lords Curriehill, Pres. M'Neill, Cowan, Benholme, and Ardmillan; *diss.* Lords Neaves and J. Clk. Inglis) that a decree-arbitral

398. The only case, therefore, in which, in the opinion of Kilkerran, a plea of non-exhaustion of the submission would be ineffectual, is the case of a submission of certain particular disputes with a general clause annexed thereto, in which all the particular disputes were decided, and also all disputes, falling under the general clause, which had a connection with any of the particular disputes; but in which some dispute was left undecided, which had neither been particularised in the submission, nor had a connection with the disputes which were so particularised. Whether, in this very special case, the non-decision of such a dispute was held to be immaterial, because the dispute was not to be considered as included in the submission, according to its fair construction; or because, on the face of the submission itself, there was reasonable ground to presume that it was of little moment to the parties, compared with those disputes which were actually decided,—does not seem to be practically of great importance. On either footing, the rule would seem to rest on principles perfectly intelligible, and admitting of easy practical application.

399. But the doctrine of Kilkerran is at variance with that of Erskine; and although it is believed to be supported by the understanding of the profession, at least in so far as it holds that non-exhaustion of the submission is a good ground of reduction of an award, yet it would appear that the relevancy of this plea has been more frequently assumed as indisputable in argument, in the decided cases, than made the subject of express judgment. In a recent case, moreover, some of the Judges intimated opinions, *obiter*, that in the case of a general submission, it was still an open question whether a power to pronounce interim-awards was not implied.[1] This appears

which exhausted the reference, but did not decide which party was entitled to a certain sum consigned in the course of the proceedings, though it bore that the sum would be paid to the party legally entitled to it, could not be set aside on the ground of non-exhaustion of the reference. The majority held that the question as to payment of the consigned money arose merely in the execution of the decree, the minority that the decree was null, because not stating to whom the sum was legally due.]

[1] Lyle, Dec. 2, 1842, 5 D. 236. In this case it may be allowed to observe that the Judges held that the submission gave express power to pronounce interim decrees, although the power was not given in the most direct or usual form; and, accordingly, their Lordships' observations on the question, whether a power to pronounce interim awards would have been implied, were merely *obiter dicta*. L. President Boyle observed: "I am not prepared to hold that a general submission of all claims does not warrant the giving out of interim decrees, even without express power to do so. But there can be no doubt in the present case, where the deed of submission contemplates there being interim decrees." L. Mackenzie was of the same opinion. L. Fullerton thought the question "might have been attended with difficulty, had it not been for the parties themselves using words which seem to me to give the power of pronouncing interim decrees. I do not mean to give any opinion on the question, whether that power is implied in a general submission."

necessarily to involve the question, whether an arbiter is bound to exhaust a general submission; since, if he has, by implication, the power of competently pronouncing interim awards, disposing of part only of the subjects submitted, these awards would become unalterable in the event of the submission expiring, and would be valid, though the rest of the subjects submitted had not been decided by the arbiter. It is now proposed shortly to examine the grounds on which the plea of non-exhaustion of a submission has been understood to rest, by those who held it fatal to an award; and to inquire whether it ought not to apply in every submission, where a power of pronouncing part-awards has not been positively given.[1]

400. In every such inquiry, the fundamental question appears to be, what was the meaning of the parties in the contract of submission?

L. Jeffrey: "Where the matters in dispute were articulate and separate, I should rather be inclined to think that interim-decrees were competent." "But what I go on is, that the words of the present submission show that interim decrees were contemplated."

[1] As incidental examples of the manner in which it has been assumed and implied, that a plea of non-exhaustion was, in the ordinary case, fatal to an award, the following instances may be given. L. Moncreiff, after explaining that a referee's award, under a judicial reference, was substantially the same with an award in a submission, observed: "When an award, in a judicial reference, is clear in its terms, correct in its form, embracing nothing which was not referred, and *exhausting all that was referred*, it is not competent for the Court to review such award on its general merits," etc.—Mackenzie, Dec. 19, 1840, 3 D. 318. In the same case, when under appeal, L. Campbell observed: "If the arbitrator has acted within his jurisdiction, *and has exhausted all that was submitted to him*, and has not been guilty of any misconduct, the award that he has pronounced is binding," etc.—Mar. 9, 1843, 2 Bell's App. 43. See also Finlay, June 25, 1834, 12 S. 792. It is noticeable that this was the case of a general submission, in which, moreover, all the claims were on one side. Compensation was claimed, *inter alia*, for the value of water, derived by the other party from the claimant's grounds. The arbiter awarded a certain annual payment, for a given term of years to come; but made no deliverance *quoad ultra*. The award was brought under reduction on various grounds, one of which was, that it had *not exhausted* the submission. Both parties earnestly discussed this plea, with regard to its being founded or not in the facts of the case; but neither of them disputed its relevancy. L. Moncreiff, Ordinary, in his note, reporting the case to the Court, observed that he "doubted the competency of the decreet in these points: 1st, Whether, etc.; 4th, Whether the decreet *exhausts the submission*, in respect that the arrangement is only temporary," etc. The Court sustained the award; but without indicating any opinion adverse to that of the L. Ordinary, on the relevancy of the plea of non-exhaustion, if they had held it warranted by the facts of the case.

The tenor of the pleadings and opinions in this case is directly adverse to the view that a general submission implies a power of pronouncing part-awards; as the plea in question could not have been availably stated, if such implied power had existed. The pleadings in the case of Love, June 1, 1825, 4 S. 54, and the note to the interlocutor of L. Mackenzie, Ordinary, distinctly imply the relevancy of the plea of non-exhaustion; the only dispute being as to the fact. There are various other cases to which the same observation would apply. See also George, Feb. 4, 1836, 14 S. 404.

Is it (in the ordinary case, and apart from specialties) according to their true intent, to hold that a power of pronouncing part-awards is implied, though not expressed? In attempting to solve this question, it will, in the first place, be observed, that it is certain, as to each and all of the disputes included in the submission, that it was the desire and intention of the parties, that they should be decided by the arbiter. The undertaking of the arbiter, by accepting the submission, was co-extensive with the submission itself, and had an equal application to every subject embraced within it. Moreover, by including these subjects within the submission, the parties forthwith shut themselves out of recourse to Courts of law, respecting each and all of these subjects, so long as the submission should endure. Not only so, but they became bound to obey the arbiter's orders as to leading proof, or preparing a record, or submitting written or oral argument to him regarding all these subjects, with the view of instructing his mind, and enabling him to pronounce judgment conscientiously under the submission.

401. These matters being certain, it appears to have been held a reasonable, if not an irresistible inference from them,—(1) that the parties only shut themselves out from recourse to the Courts of law, in reliance that they should obtain an award from the arbiter in its place; and (2) that there were no *termini habiles* for arriving at any other conclusion, than that this reliance extended to the whole subjects embraced in the submission, where the parties themselves did not positively confer a power of pronouncing part-awards upon the arbiter. From this it followed, that an award which disposed of part only of the subjects under submission, was not such an award as the parties, by their contract (when rightly construed), had bound themselves to implement.

402. It seems never to have been maintained, that if an arbiter had long kept up a submission, perhaps for years, and had put the parties to great trouble and expense in laying proof and argument before him, during all which time they were cut off from any judicial remedy,—he could thereafter pronounce an award which would be valid, though it only disposed of a small and trifling part of the submission. It appears always to have been conceded as undeniable, that such a proceeding by an arbiter was not in accordance with the understanding on which alone the parties could rationally have entered into the submission, and on which alone the arbiter himself could rationally have undertaken it. But if so, it seems very difficult to draw a line, including anything short of the whole subjects submitted, for determining whether an arbiter has performed the duty which he had undertaken, the duty in reliance on which the submission was made to him.

403. Any other course would always raise the question—ap-

parently a question of fact, not easily to be determined—whether the actual *quantum* of the submission, which was disposed of by the award, was so considerable, that the parties would have entered into the contract of submission, although they had known that this, and no more, was to be decided by the arbiter. But how such a question of fact could be practically solved, it is difficult to see. For it might easily occur, in any case, that one at least of the parties would not have entered into the submission at all, but would have gone straightway into Court, unless he had relied that all the subjects submitted were to be settled by the award. Wherever any one subject was left out of the award, *quomodo constat* that the parties would have agreed to their contract of submission, if that particular subject had not been embraced within it?

404. It would appear, therefore, that at least no middle term can be found, and that those who maintain that an arbiter, without being expressly empowered to that effect by the submission, can nevertheless pronounce a part-award, provided that it disposes of the greater part of the subjects submitted, must also maintain that the arbiter could validly pronounce an award disposing only of a minor and trifling part of the disputes of the parties, and leaving out all the rest for Courts of law. But it is believed that so strong a position as this last, has never been seriously supported; seeing that it stands so plainly in opposition to the true understanding and object of all the parties under the contract of submission at the time of their entering into the contract.

405. It is material also to observe, that the indications of opinion which were, *obiter*, given by some of the Judges in the above case of Lyle, as they referred solely to the case of a *general* submission, might fairly be held to imply, that in any other species of submission the plea of non-exhaustion would be fatal. But this greatly narrows the view expressed, perhaps loosely, by Erskine; and would seem to lay the *onus* on any party maintaining that a *general* submission implied a power of pronouncing interim-awards, or part-awards, to point out some clear principle by which a general submission should, in this important respect, be distinguished from all other submissions.

406. If, indeed, it followed, from the universality of the terms employed in a general submission, that if any party, after an award was pronounced, could show that some one dispute between himself and the other party still remained undetermined, he would thereby be enabled, *de plano* to overthrow the award on the plea of non-exhaustion, that would be a strong ground for distinguishing the general submission from all others, and holding that it implied a power to pronounce part-awards. But it has been already explained,[1] that this is not the operation of the terms of the general submission, wide

[1] *Supra*, sec. 104 *et seq.*

as they certainly are. It is necessary that the parties shall duly bring before the arbiter, in the procedure under the general submission, those particular disputes on which they desire to have his award. And supposing this to be regularly done, there seems to be no sufficient reason why the arbiter, under a general submission, should not be held as much bound to exhaust all these disputes, by his judgment, as he is bound to exhaust all the disputed matters, under any other form of submission, in which he is not expressly empowered to pronounce part-awards.

407. It has been decided that an arbiter is not entitled to renounce his office at his own discretion.[1] Nor can he do so, even when supported by one of the parties in taking such a course. By his acceptance of the submission, he incurs an obligation towards both and each of the parties, and either of them may insist on his *bona fide* fulfilling it. It appears, however, to be nearly irreconcilable with this obligation, to hold it to be in his power to decide, at his own discretion, any part, however small, of the matters submitted, and so to close the submission with a valid award, although no express power of pronouncing a part-award had been conferred on him. This would practically be authorising him to renounce his office, as to any part of the submission, however large, if he only fulfilled it as to any other part, however small.

408. On the whole, therefore, there would appear to be strong ground for maintaining, that, when the question shall purely arise, whether an arbiter, under any submission which gave no express power[2] to pronounce part-awards, has, nevertheless, an implied power to pronounce them, it would be found that he had no such power.

409. But it has been said that there is, at all events, one class of cases in which the power to pronounce a part-award is implied; and that this has been so decided, both in the Court of Session and in the House of Lords. This is where all the claims which are submitted are made on one side, and the other party merely occupies the position of a defender resisting them. The particular decision[3] where the doctrine in question is said to have been settled, is marked by some

[1] Marshall, Mar. 26, 1853, 15 D. 603.

[2] It is, perhaps, scarcely necessary to remark, that this does not apply to any submission in which, upon fairly construing it, it can be held that a power to pronounce part-awards was positively given, though not in express words. For instance, though no such words occur in the clause bestowing powers on the arbiter to lead proof, etc., yet if the parties eventually bind themselves to implement all awards, interim or final, which may be pronounced, this would unequivocally, though indirectly, show that the parties intended to give the power of pronouncing part-awards. —Lyle, Dec. 2, 1842, 5 D. 236. See also Montgomerie, Dec. 8, 1849, 12 D. 274, in which a power of pronouncing interim-awards was held to be positively given, by necessary implication, though not *totidem verbis*.

[3] Maclellan, July 9, 1830, 4 W. & S. 157.

specialties, inasmuch as the precise scope of the submission required to be spelt out of a series of letters, and its limits were not held to be clearly ascertained. If, notwithstanding specialties, the case can be held as a decision on this point by the House of Lords, it would be out of place to do more than record the doctrine thereby settled. But as it is, perhaps, open to question, whether the point is really foreclosed, it may be allowed to inquire whether this particular class of cases is really, and on sound principle, distinguishable from the rest.

410. The ground on which the plea of non-exhaustion rests, where there are mutual claims, appears (as already noticed) to be, that the parties, by including all these claims in the submission, intended and relied that the arbiter should dispose of them all by his award; and that if he left any part of them out of his award, it might happen that he was leaving out that very subject, but for which, the parties would not have entered into the submission at all. But if so, the very same ground appears to have place where the claims are all on one side, as much as when the claims are mutual. In fact, the element of *mutuality* properly enters into every single claim which is *disputed*, quite as much as into the case of separate claims, urged respectively by the several parties. Where a series of claims, all on one side, are submitted to an arbiter, this seems to be done in precisely the same reliance that he shall dispose of the whole of them, as is confessedly the case with a series of claims, some of which are urged by one party, and some by another. And if so, and if the arbiter shall nevertheless decide only a part of these claims (perhaps after years of litigation as to the whole, before him), *quomodo constat* that the claims which were left out were not the very claims, without which the parties would never have agreed to the submission at all? Is it meant to be maintained, that, after years perhaps of discussion before an arbiter, he may validly pronounce an award, disposing only of a small part of these claims, and may leave over all the rest for Courts of law, whenever it happens that all the claims under the submission are made on one side? If this doctrine is not maintained to its full extent, there seems to be an insuperable difficulty in saying what *quantum*, short of the whole of the claims submitted, must be determined, in order to make the award good. But, further, if it be the element of *mutuality* by counter-claims, which is necessary to found the plea of non-exhaustion, how far must this species of mutuality be carried? Must the counter-claims balance each other in importance? Must they, at least, be considerable on both sides; or will even a small claim on one side, with large claims on the other, let in the necessary element for founding the plea of non-exhaustion, though the absence of that one small claim would have cut off all ground for the plea? With deference, it seems difficult to

find any solid ground for distinguishing, as to this, between submissions in which the claims are all on one side, and submissions in which claims are preferred by each of the parties. If, therefore, the point be still open, it would appear most consistent with principle, and most convenient in practice, to hold that the foundation of the plea of non-exhaustion stands entirely clear of the question, whether the claims submitted are all made on one side, or are made partly on one side, and partly on the other.

411. In any view, it is advisable, even if it should not be indispensable, to give an express power to pronounce interim-awards or part-awards, in all cases in which it is desired that an arbiter shall have such power. The ordinary clause for doing this will be found in the styles in the Appendix. It is frequently of importance that such a power should be bestowed upon an arbiter, as he may be able, in some cases, to dispose of part of the matters submitted, at a comparatively early stage of the procedure; and it guards against the risk of any subsequent miscarriage affecting the submission itself, in so far as concerns the matters comprehended in the part-award. Such risks, in a protracted submission, are far from being unknown.

412. Where it is the arbiter's duty to exhaust the submission by deciding all the questions which fall under it, the presumption will be, that it was his intention to pronounce an exhaustive award. In the case of a reduction, therefore, of an award in these circumstances, on the plea of alleged non-exhaustion of the submission, the Court will incline to construe the award as embracing and disposing of the whole subjects submitted, if it can fairly admit of such construction.[1]

413. In the question, whether a submission has been exhausted, points of nicety have repeatedly occurred regarding the effect of *reservations*, when these have been introduced by arbiters into their final awards. The losing party is frequently enabled thereby to maintain a plausible plea, that the award has not exhausted the submission, but has left undecided a portion of the matters in dispute. But if a reservation be introduced at the special request of one of the parties, that party will be held barred, by personal exception, from afterwards objecting to the award, on account of its containing that

[1] Gray, Feb. 5, 1833, 11 S. 353. Arbiters, in granting interim-interdict, prohibiting one of the parties from using a road, at an early stage of the submission, reserved a claim of damages at his instance, in the event of the interdict not ultimately proving well founded. The arbiters, eventually, by their award, found the party entitled to the use of the road, but took no notice of the reserved claim of damages. As the award purported, however, to dispose of all claims, *hinc inde*, the Court held, in a subsequent action claiming damages for the temporary loss of the road, as a matter not disposed of by the arbiters, that the claim must be held to have been included in the general words of the award.

reservation. And it would appear that the facts on which such a personal exception is rested, may, if disputed, be proved *pro ut de jure*.[1]

CHAPTER XI.

POWER OF ARBITER TO REMIT TO MEN OF SKILL.

414. It has already been noticed, that the primary duty of an arbiter, in preparing to give a just judgment on the matters submitted, is to inform his own mind thoroughly regarding the merits of the case. For this purpose he possesses large inherent powers, as no parties can, at one and the same time, require him to give them a conscientious award upon their case, and yet withhold from him the necessary means of doing so, by duly informing his own mind thereon. In every submission, therefore, the parties, either expressly or by implication, empower the arbiter (in so far as they can confer the power) to use such lawful means as he may find necessary for informing his own mind on the matters in dispute: in other words, for enabling himself,

[1] Arthur, July 16, 1773 (667); and Hailes' Dec. 534.

In a submission, Arthur and Callin preferred mutual claims of accounting against each other. The arbiters decerned against Arthur for upwards of £1000, and found that two acceptances by Callin for £450 were not subsisting debts, unless it were proved by Callin's writ or oath that he got value for them, and had never repaid it. The award reserved right to Arthur to make this reference, if so advised.

Arthur brought a reduction, alleging that, by virtue of the above reservation, the arbiters had not exhausted the submission, but had left an important part undecided, the settlement of which might involve a protracted lawsuit. Callin answered, that Arthur was barred by personal exception from stating this plea, as it was at his own express request that the reservation had been introduced into the award; and that, but for such request, the arbiters were prepared to reject the two acceptances absolutely, and would have done so. He offered to prove this by the arbiters' oaths, and by the clerk to the submission; to which Arthur objected that such proof was incompetent. The L. Ordinary, before answer, allowed a proof, *omni habili modo quo de jure*, of the above allegations of Callin. Arthur reclaimed. L. Hailes observed: "The proof is competent. Arthur's objection to the decreet-arbitral is, that the arbiters have left a point to be decided by after probation. Callin answers, the arbiters did this at Arthur's special request, and this fact will be proved by the oaths of the arbiters. Arthur cannot be allowed to object to his own deed; he is barred *personali exceptione*. The purpose of the proof is singly to make good the *personalis exceptio*." L. Pres. Dundas: "I will neither support nor overturn a decreet-arbitral by the evidence of witnesses; but I will allow a *fact* to be proved concerning a decreet-arbitral, in order to explain the *res gesta*." The Court "found that the arbiters may be examined; adhering."

conscientiously and intelligently, to discharge the duty which, at their request, he has undertaken. There may, no doubt, be exceptional cases, under peculiar circumstances, which may warn an arbiter not to enter on some particular investigation without receiving special authority from the parties; but the general rule, applicable to the circumstances of an ordinary submission, would seem to be that which is now stated.

415. Although the paucity of decisions upon the subject prevents it from being regarded as yet fully settled, it would appear to follow, that if an arbiter, in considering the matters submitted, should find that he requires the assistance of an opinion from a man of skill, as being a necessary means of informing his own mind, he is entitled to call in such aid; and the parties will be, conjunctly and severally, liable in the requisite expense of procuring it.[1]

416. Thus, for example, where a submission is made to a mercantile man, it may happen that, in the extrication of the matters at issue, some question of law incidentally requires to be resolved. The arbiter is certainly not bound, on that account, to throw up the submission; perhaps he would not even be permitted to do so, but could be compelled by either party to proceed in the discharge of the duty which he had undertaken. But still less is he bound, because of the occurrence of a legal question, to set himself down to study the law, in the preposterous attempt of making himself a lawyer for the occasion, and so resolving the point of law by his own opinion, formed as a professional amateur. Or it may happen that allegations as to the proper mode of working a coal-mine, or building a bridge, or a ship, etc., are made in the submission, and require to be intelligently disposed of. The arbiter is not bound, himself, to become a miner, or engineer, or shipwright, on that account, in order to enable him to deal justly and adequately with these subjects. Indeed, any attempt on his part to render himself a lawyer, or miner, or engineer, for the occasion, would probably be the least advisable course which the arbiter could follow,

[1] "Held that the employment by an arbiter of a man of skill is not *ultra vires*." —Caledonian Railway Co., Mar. 23, 1860; House of Lords Cases, p. 8, appended to 22 D. See also 32 Scot. Jurist, 472, [and 3 Macq. 808].

It was an arbitration for fixing the price of lands, and the compensation for damages to be awarded against a Railway Company, whose line intersected the lands of the other party. The arbiter had employed a man of skill to make a survey and report, upon which he proceeded in forming his own opinion. An objection was taken by the Railway Company, that this act of the arbiter was *ultra vires*. The objection was repelled.

In the House of Lords, L. Wensleydale observed: "The second objection—that the arbiter acted *ultra vires* in employing an expert to survey and report—is not maintainable." "An arbiter is not prevented from consulting men of science in every department where it becomes necessary. So he has a power to call in a valuer to assist him, unless restricted by the terms of the submission. This was decided in Anderson *v.* Wallace, 3 Cl. and Fin. 26."

for attaining the end in view. In cases like these, he takes the best method *ad informandum animum* by remitting to men of skill in their several respective departments, to give their opinions upon so much of the matters in issue as may belong to their proper province; and by these opinions he receives the requisite assistance to guide himself safely in forming a sound opinion of his own, and so enabling himself to discharge his own duty. They supply him with the best *evidence* of that which, as *matter of fact*, he requires to know, viz., what is the law on such or such a question, or what is the proper mode of working the coal-mine, etc., in the actual circumstances. Having such evidence before him, the arbiter then considers it, and makes up his own opinion as to its import and bearing upon the case; in all which, he is no more delegating his arbitral functions to third parties, than when he takes the evidence of witnesses, in the ordinary case, respecting alleged facts, of which he personally knows nothing, and respecting which he can only ascertain them by weighing the evidence before him, and estimating the true result of it for his guidance.[1] In all such cases, therefore, the arbiter seems entitled, under his inherent and implied powers, to make a remit to a man of skill, in order to procure his opinion; the parties-submitters being bound jointly and severally for the due remuneration of the persons of skill so consulted. In making his selection of the man of skill most fit to be employed, the arbiter will naturally endeavour to carry with him the concurrence of both parties-submitters.

417. It is common and expedient, in submissions where the probable employment of men of skill is foreseen, to insert in the submission express powers to employ them. But it is believed that instances are frequent in practice, in which men of skill have been incidentally employed by arbiters, under the power inherent in the arbitral office. The reported cases appear, incidentally, to afford many indications of this. In the case of Grant, although the arbiter was himself an accountant, and no power was given in the submission except the ordinary power to lead such proof as he might find necessary, the arbiter remitted to another accountant, to examine certain books and accounts, etc., and report on their import. His award was keenly challenged on other grounds, but no objection was taken to that remit as *ultra vires*.[2] And where a mercantile arbiter, in a mercantile question, remitted to an accountant to prepare a state of accounts between the parties, it was held that the parties were jointly and severally liable in payment of the accountant's fee, notwithstanding

[1] In like manner, if a letter in a foreign language required to be read by the arbiter, who was himself ignorant of that language, he would neither be bound to study the language for himself, nor yet to throw up the submission. He would be entitled to employ a man skilled in the language, to furnish him with a translation.

[2] Grant, June 23, 1820, F. C. See Sess. Pap. in Adv. Lib.

an objection, expressly taken, that the arbiter was not entitled to make the remit.[1]

418. It will be observed, however, that, as the foundation of this power in the arbiter rests on his being entitled to do whatever is necessary *ad informandum animum judicis*, it seems to follow that if he made remits under circumstances in which it was palpably futile and superfluous to do so, or if he directed a remuneration to be paid which was grossly excessive, such procedure would be *ultra vires*, and the parties would not be bound to pay the remuneration decerned by the arbiter in favour of the persons so employed. The extent of the arbiter's legitimate power in this department would appear to be,—(1) that of employing such men of skill as were reasonably necessary for informing his own mind; and (2) that of awarding to them such remuneration as was fair and suitable. But, if so, it would follow that any gross and palpable excess committed by the arbiter, in either respect, would at once expose him to the objection of having acted *ultra vires*.

419. It is proper to observe, at the same time, that it would apparently be only in the case of palpable excess being committed by the arbiter, that the Court would interfere with what he had done. A considerable degree of discretionary authority is necessarily vested in him, without which, few competent men would be willing to undertake the duty of arbiters; because, otherwise, they might incur personal responsibility to men of skill employed by them, without having any relief, if they were found to have but slightly strained their powers in so doing. It would only, therefore, be in the event of palpable excess of power, that a Court could be expected to hold the parties not bound to remunerate the men of skill employed to the full extent which was awarded by the arbiter.

420. It may be further remarked, that the claim of the men of skill so employed, for fair and suitable remuneration, arises from the fact of employment, and from the work having been done by them, independently of any award for their payment being made by the arbiter. In the event, therefore, of their work, under the remit, having been duly performed by them, and the submission thereafter falling without any award; or in the event of their being otherwise left without an award for their payment; their legal claim for remuneration from both and each of the parties-submitters, jointly and severally, would appear to be nevertheless complete.[2]

[1] M'Leod, Dec. 17, 1825, 4 S. 335. The Session Papers in White, July 7, 1796 (633), and Mitchell, June 17, 1848, 10 D. 1297, show incidentally that the arbiter had taken the opinion of counsel for his guidance, as to points of law arising under the submission, without this being objected to as *ultra vires*.

[2] Macfarlane, June 29, 1842, 4 D. 1459. This was the case of a clerk to the submission; but the principle would appear to apply equally to the remuneration of any other man of skill competently employed by the arbiter, in the business of the sub-

421. Even in the event, however, of the arbiter's award of remuneration to men of skill being reduced, in whole or in part, it would appear that such a matter was so entirely distinct from the award proper, which dealt with the disputes submitted, that the award proper should remain entire and unhurt, though the decerniture for remuneration was set aside.[1] But, in such a case, the personal liability of the arbiter, to the men of skill employed by him, would probably be appealed to. Where the arbiter's excess of power consisted in remitting to a greater number of men of skill than were at all requisite, he would seem to be personally liable, to the extent of fair remuneration, to every man of skill who had acted on his remit. Where, on the other hand, the arbiter's excess of power consisted in having awarded too large a remuneration to one man, it would seem, that if that man obtained an amount of payment from the parties, equal to fair remuneration, he should not have a legal claim against the arbiter for anything beyond that amount, unless there were some special grounds of liability attaching to the arbiter, besides that of merely having inserted a decerniture for an excessive sum in his award. Apart from specialties, the true debt due to the man of skill was just a fair and suitable remuneration for his work. The award of any sum beyond that amount, being a mere gratuitous and harmless mistake committed by the arbiter, after all the work had been done, would seem to afford no ground of personal liability against himself.

422. The precise measure of personal liability which an arbiter incurs towards those men of skill, whom he, acting within his powers, may employ in a submission, is not perhaps clearly settled. On the one hand, he is the direct employer of the man of skill, who acts on the arbiter's remit, and thereon gives his time, labour, and skill for the arbiter's behoof, in the first instance, and to enable him to perform his official duty. On the other hand, the arbiter's *quasi*-judicial office is, in the knowledge of all concerned, purely honorary in itself, and may possibly lead to no pecuniary remuneration being made to him. It is scarcely within the fair limits of the understanding of parties, that such an honorary officer should make himself personally liable to a third party for performing a piece of business, which was substantially for the benefit of the parties-submitters alone. Moreover, the arbiter, in making the remit, and so giving the employment, was acting merely as the mandatary—the known mandatary—of these parties-submitters. The liability of both and each of the parties-submitters, to remunerate the man of skill, was well known to all con-

mission. [With regard to the liability of each party for the expenses of a submission under the Lands Clauses Act, 1845 (8 and 9 Vict., c. 19, sec. 32), see Burnet *v.* Henry, Nov. 30, 1866, 5 Macph. 96.]

[1] Gardener, July 10, 1741, Elch. Arb., No. 5; Jack, Mar. 6, 1777 (Dicty. Arbn., Appx. 5); and similar cases.

cerned at the time the remit was made. There would seem, therefore, to be much ground, both in law and in justice, for maintaining that the credit of the parties-submitters was alone relied upon by the man of skill in undertaking the remit. But, until the point shall be authoritatively settled, it might perhaps be advisable, as a practical rule, to insert in every remit to a man of skill a clause intimating that the parties-submitters alone are to be liable to him for his remuneration.[1] It is scarcely conceivable that, in any submission which was worth carrying on at all, there should not be one of the parties at least who was sufficiently solvent to induce a man of skill to act upon such a remit, and to look exclusively to the parties-submitters for payment of his remuneration.[2]

CHAPTER XII.

POWER OF ARBITER OVER THE EXPENSES OF PROCESS.

423. It is usual to confer express power on the arbiter to award the expenses of process to either party. But, in the absence of such provision, the power of dealing with the expenses nevertheless belongs to the arbiter by implication, unless the parties see fit positively to exclude it.[3] This power belongs to the arbiter in all submissions, whether judicial or extra-judicial. In the case of a judicial reference, the arbiter can award not only the expenses incurred before himself in the reference, but also the expenses incurred in Court, unless there be terms of special limitation introduced into the minute of reference.[4]

424. In this, as in all other matters, an arbiter must strictly conform to the terms of the submission, and keep within his powers,

[1] This was done in the case of Mitchell, June 17, 1848, 10 D. 1297; see Sess. Papers.

[2] In Macleod, Dec. 17, 1825, 4 S. 335, an accountant brought his action for payment of his remuneration against the arbiter who had remitted to him, as well as against both of the parties-submitters. No defences were lodged, except by one of the parties; so that no discussion took place respecting the arbiter's personal liability. Decree went against the arbiter in absence.

[3] "All submissions are a species of action in which the arbiter has the same power as a judge; and, that being the case, although nothing is said about the matter, it is reasonable that he should have the power to give expenses."—Per L. Mackenzie, in Ferrier, Jan. 28, 1843, 5 D. 461.

[4] Berry, Dec. 15, 1827, 6 S. 256; Smith, June 15, 1830, 8 S. 920; Fairley, Feb. 11, 1836, 14 S. 470; Robertson, Dec. 6, 1836, 15 S. 199; Ferrier, Jan. 28, 1843, 5 D. 456, Affd. April 18, 1845, 4 Bell's Apps. 161. [Paul v. Henderson, March 15, 1867, 5 Macph. 613; Hilton v. Walker, July 2, 1867, 5 Macph. 969.]

whatever these may be. Accordingly, where a party had sisted himself in a submission only "in the character of trustee" of one of the parties-submitters, the arbiter was held to have no power to decern against him, as liable for expenses, except in the character in which he was sisted, viz., as trustee.[1]

425. So, likewise, where certain conditions are prescribed in the submission for guiding the arbiter in determining which of the parties should be subjected in expenses, these must be strictly complied with, or the award will be (at least *pro tanto*) reducible as being *ultra vires*.[2]

[1] During the progress of a submission, first, a voluntary trustee of one of the parties-submitters, and afterwards, on the party's sequestration, his statutory trustee respectively sisted themselves, each expressly "in the character of trustee." The arbiter gave an award against them, conjunctly and severally, for a large sum of expenses, and an action was raised to recover payment of the amount. The defence was sustained, that the award was *ultra vires*. The opinions of the Court are not given. The L. Ordinary, in his note, observed that, "even on the supposition that a person, by merely sisting himself in a submission, binds himself to implement the decision of the arbiter—which, to say the least of it, is questionable—the L. Ordinary does not think that the defenders, by sisting themselves expressly in the character of trustees, could, by any latitude of implication, be held as binding themselves to submit to any decree against them, except in that character."—Whitehead, Nov. 16, 1833, F. C. It may be here remarked, that the plea of a trustee's want of trust-funds has been repeatedly overruled, when stated as an objection to a decerniture for expenses against him. See Gibson, May 25, 1833, 11 S. 656; Clyne's Trustees, Feb. 8, 1840, 2 D. 554; Torbet, Feb. 23, 1849, 11 D. 694; Beadie, June 21, 1850, 12 D. 1069.

[2] An instance of the strictness applied in construing such conditions occurred in Gye and Co., May 15, 1835, 1 S. and M. L. 747. An action of accounting was raised, concluding for payment of £500, or such other sum as should be found to be the balance due upon agency-transactions, embracing much detail, extending over a tract of time, and amounting to upwards of £45,000. The action was judicially referred, the pursuers' demand being now stated at £120; and it was stipulated in the reference, that the referee should ordain "the losing party" to pay the expenses. The experienced accountant, to whom the case was referred, ascertained, as the result of a careful examination of multifarious transactions and accounts, that a balance of only £4, 3s. 11½d. was due by the defender. He intimated, at the same time, that these arose from "certain immaterial errors or omissions in the books which were under his (defender's) charge;" "and that, keeping in view the extent and magnitude of the business under the defender's charge, the errors and omissions are less, in my opinion, than might reasonably have been anticipated." The referee, therefore, considered the pursuers to be truly and substantially "the losing party," and decerned against them for expenses. This decerniture was objected to as *ultra vires* by the pursuers, on the plea that a pursuer who recovers a decree for any amount, however small, is not technically "the losing party," seeing that the issue of "resting-owing" has been decided in his favour. The Court of Session were not moved by this reasoning, in the circumstances, and interponed their authority to the referee's report; upon which the pursuers took the case to appeal. L. Brougham expressed great difficulty in affirming the judgment, because, "unfortunately, according to the strict use of the words, 'the losing party' must be the man who has the sum of £4, 11s. 3d., or some such sum of money, awarded against him." His Lordship, however, affirmed the judgment, with a

426. Where it is intended to give power to the arbiter to decern for the expenses of recording the award or awards to be pronounced, it might probably be prudent to insert this express power in the clause relating to expenses; because the cost of putting a final and delivered award upon record may be plausibly alleged to be an expense which only has its origin and commencement at a date subsequent to that at which the submission had already closed.[1]

427. A judicial referee, in his report to the Court, found one of the parties liable in expenses, "inclusive of the fee" to the referee, "if it shall be the pleasure of the Court to find him entitled to remuneration." An objection was taken to this finding, in favour of the referee himself, as being incompetent. But the Court unanimously repelled it, found the referee entitled to remuneration, and remitted to the auditor to determine the amount of remuneration due to the referee and his clerks, when taxing the other expenses.[2]

428. In a case in which the submission empowered an arbiter, in the usual terms, "to award to either party the expense to be incurred by him in the course of the submission," the arbiter found one of the parties entitled to his expenses, and decerned for the amount directly in the agent's name. He also decerned for the account due to the clerk of the submission directly in the name of the clerk. In a suspension, besides other reasons, it was contended that it was *ultra vires* of the arbiter to pronounce decree directly in name either of the agent or of the clerk, as neither of them was a party to the submission, and no special power to give decree in their names was contained in the submission. It was answered, that "it is the universal practice to pronounce decreets in favour of the clerk, *nominatim*, for his expenses;

special declaration, "that this order is made upon consideration of all the peculiar circumstances of this particular case, and that it is not to be drawn into a precedent as authorising the inference, that a submission to arbitration, where the parties agree that the arbiter shall order the losing party to pay the expenses, either leaves the *quantum* of expenses in his discretion, or leaves it to him to determine that any one is the losing party, other than the party against whom he makes his decreet-arbitral, upon the merits of the case, to any amount." Perhaps it may be permitted to remark, that probably the parties themselves had no great difficulty in discovering which of them, in truth and substance, was the losing party. At the same time, the history of the case suggests a caution as to the avoidance of certain terms in framing any clause regarding the power to deal with expenses, either in a submission or a judicial reference.

[1] As to the expense of putting an interim award upon record, see Anderson, Feb. 6, 1836, 14 S. 447; in which it was observed by L. Cockburn, Ordinary, in his note to an interlocutor, which was adhered to by the Court: "The objection, that the arbiter has decerned for £2, 4s. 11d., as the expenses of recording the interim decree, is answered by the terms of the submission, which empower him to decide as to 'all expenses to be incurred.'" It was a submission of a process to arbitration, and the arbiter was empowered "to decide upon the question of expenses incurred in said process, and to be incurred in the course of this submission."

[2] Baxter, June 1, 1838, 16 S. 1085.

and the agent is entitled, in like manner, to have decreet, *proprio nomine*, for his client's expenses, the same as in the Court of Session." L. Moncreiff, Ordinary, in his interlocutor, found that there were no grounds of suspension "inferring nullity, *ex facie*, of the decreet:" but, as the charger was confessedly in labouring circumstances, and as an action of reduction of the award had been raised, containing some reasons which required investigation, his Lordship qualified his refusal of the bill of suspension with a condition that the charger should find caution to repeat, in the event of the reduction being successful. The Court adhered.[1]

429. From the note appended to L. Moncreiff's interlocutor, it appears that it was solely to other reasons of suspension than that of the decree for expenses being in the name of the agent and the clerk respectively, that his Lordship attached any importance. The note specially adverts to these other reasons, and takes no notice at all of the reason relative to the expenses. And as that latter reason, if well founded in itself, was proved at once *ex facie* of the procedure, by a mere comparison of the terms of the submission with the terms of the award, it may be inferred that the Court had viewed the subject in the same light in which it appeared to L. Moncreiff. In addition to this, when the decision in the case of Henry[2] is taken into view, there appears to be strong ground for concluding that, in the ordinary case, no sound objection could be stated against a decree for expenses being pronounced directly in the name of the agent of a party, in place of the party himself, wherever both the party and his agent request the arbiter to do so.

430. The expenses awarded by the arbiter should always be taxed to a specific amount, pending the submission, and decerned for in the award.[3] In one case, however, where an award found one of the parties liable to the other in two-thirds of his expenses, and did not modify or ascertain the amount of the expenses in question, an objection, which was founded on this circumstance, was repelled.[4]

[1] Hood, Dec. 13, 1832, 11 S. 209, and Sess. Papers.

[2] Jan. 29, 1835, 13 S. 361. In this case, one of the parties-submitters assigned his claim under the submission; and, at the close of the procedure, the assignee produced the assignation in his favour, and craved decree in his name, in place of the cedent. The arbiter decerned in favour of the assignee, and the award was sustained by the Court. On the same principle, it would appear that an award, decerning for expenses directly in name of the agent, ought to be sustained, as he is the true creditor in such a debt.

[3] [In the case of Hilton *v.* Walker, July 2, 1867, 5 Macph. 969, where the arbiter awarded expenses of a certain amount, the Court refused to remit the accounts to the auditor for taxation, although it was averred that the expenses awarded exceeded the sum actually incurred.]

[4] Paterson, May 15, 1829, 7 S. 616. The Court sustained the award, observing: "As to the decree being for two-thirds of the expenses, that this was no ground of

431. Where an award, which is partially set aside in a reduction, contains a finding of expenses which have been awarded by the arbiter against the pursuer of the reduction, it will generally follow that the finding of expenses also must be reduced. That finding is made by the arbiter, while he is necessarily in the belief that the whole award, as pronounced by him, is valid; and *quomodo constat* that he would have found expenses, or at least the same amount of expenses, if he had known that part of his award was invalid? But, in a case where the Court held that the peculiar circumstances furnished clear internal evidence that the finding of expenses against a party was not, in any degree, rested upon the portion of the award which was eventually reduced, their Lordships refused to reduce the finding as to expenses. On appeal, the judgment was affirmed.[1]

reduction, although, if the pursuer should be charged for payment of an indefinite sum, he might be entitled to suspend."

If the total sum of expenses had been modified by the arbiter, it would have been immaterial that the "two-thirds" thereof had not been stated in figures, as the amount admitted of easy computation, and was a precise amount, the whole of which the arbiter himself had expressly awarded. But, as the case actually stood, an objection, certainly of some importance, was raised, which an arbiter, in point of prudence and correctness, should avoid, by always modifying any expenses allowed by him to a specific amount, and decerning for that amount himself.

In connection with this subject, the case of Younger, Nov. 23, 1847, 10 D. 133, deserves attention. In a submission between a land proprietor and a Railway Company, under the Lands Clauses Act, the arbiter found the Company liable in expenses, but did not tax them, or decern for any specific amount. The proprietor then brought an action to recover payment of his expenses. Various objections were stated to items in the account claimed; but the defenders expressly waived all objection to the competency of the Court to entertain the action and dispose of its conclusions. The Court, while sustaining various objections, and decerning for the rest of the amount, thought it right to make express allusion to the defenders' positive waiver of any plea regarding the competency of the action; and their Lordships did so, in terms sufficiently pointed to make it evident that an arbiter should not leave room under his award for any such plea being raised in future.

[1] Ferrier, Jan. 28, 1843, 5 D. 456, and April 18, 1845, 4 Bell's Apps. 161.

The Court felt considerable difficulty in disposing of this point in the case. L. Fullerton observed: "There is, no doubt, a difficulty as to the arbiter's award of expenses. It is said that it must fall, because one point decided by the arbiter is now found to have been *ultra vires compromissi*, and it cannot be known what effect that finding may have had on the arbiter in giving expenses. This plea would have been conclusive, had the question been raised at the instance of the party who has got the benefit of the decree. But there is a great difference between that case and the present, where it is admitted that the claim (now found to have been *ultra vires* of the arbiter to decide) was advanced on the part of the pursuer, and, to a certain extent, decided in his favour. He now says that the finding of expenses must have been influenced by the opinion of the arbiter on the question so raised, and that if it had been thrown out of view, *non constat* that he would have given expenses. Now, how can this be maintained, when, if the arbiter had taken the view which he ought to have taken, he would have repelled the claim as *ultra vires compromissi*, and the pursuer, instead of getting £12, 4s. 2d., would have had his claim repelled out and out, with expenses? There is no ground, therefore, for holding that the

CHAPTER XIII.

POWER OF ARBITER IN DEALING WITH PENALTIES.

432. It is usual that the parties, besides binding themselves to implement the arbiter's award, adject a special penalty to be incurred, in case of failure to perform this obligation. But unless in so far as the parties have expressly agreed in the submission, to subject themselves to a penalty, the arbiter has no power to impose any.[1]

433. In the event, however, of an arbiter's either imposing a penalty, where none was stipulated in the submission, or a penalty greater than the sum so stipulated, the Court incline to treat it as an excess of power in an isolated manner, which does not annul the rest of the award, though it is necessarily null in itself. They, accordingly, reduce the award, if it be otherwise unimpeachable, only in so far as regards the penalty; or they restrict it in so far as regards the excess of the penalty, as the case may be.[2]

434. The object of inserting a penalty in the contract of submission, is to enforce specific and prompt implement of the award; not to substitute either a fine or a money-compensation, in lieu of such implement. The style of the submission should, therefore, bear that the penalty is to be exigible "over and above performance."[3] But although these words should be omitted, it would appear that a party would be entitled to compel specific performance not the less because of the adjection of the penalty, such being the true meaning and import of the contract.[4]

finding of expenses was at all affected by the arbiter's view of the question, which was *ultra vires;* for I think, had he taken the proper view, the finding would have been *a fortiori.*"

L. Pres. Boyle and L. Mackenzie placed their judgment on "the special ground," that the pursuer had maintained in the submission, that it was competent to the arbiter to decide on that question which was afterwards found to be *ultra vires.* "He was, therefore, the person who caused the decision which has been reduced to be pronounced." L. Jeffrey concurred, and observed: "Suppose the pursuer, in the course of the submission, had seen that this point was going against him, and that he had prevailed on the arbiter to think that he had no power to decide it, I think he would have found him liable in expenses, in respect the discussion was introduced by himself."

[1] 4 Ersk. 3. 32; Gairdner, July 10, 1741 (627); Grosat, Jan. 24, 1739 (626).

[2] Macilhose, July 13, 1738, 5 Suppt. 204. By their interlocutor, the Court "restrict the penalties in the decreet-arbitral to the penalty contained in the submission, and repel the nullities proponed on these grounds," etc.—See also Gairdner and Grosat, *supra.*

[3] Jurid. Styles (3d ed.) 2, 164 (4th ed., 2, 257).—See Appendix.

[4] 1 St. 17. 20; 3 Ersk. 3. 86; 1 Bankt. 23. 12; Bell's Pr., sec. 34 (3). "The stipulation of a penalty (unless when expressly so declared) is not held to discharge

435. It has been formerly noticed, that the effect of the submission and the award, taken together, is to produce a binding contract, the obligations of which, *hinc inde*, are to be gathered from the findings and decernitures in the award. When, therefore, the sanction of a specific penalty has been agreed to in the submission, and the arbiter accordingly ordains the parties to implement the award, under the sanction of the said penalty, the operation of that sanction is analogous to what it would be, if annexed to a simple personal contract, in which (without the intervention of any submission) the parties had undertaken obligations of the same tenor with those resulting from the findings and decernitures of the award. If, therefore, the award decerns against a party for the payment of a sum of money, under the penalty contained in the submission, the operation of the penalty would appear to be the same as if that party had, in a simple personal bond, bound himself to pay that sum of money, under the said penalty. The penalty, accordingly, whatever its amount, will merely cover the creditor's expenses, necessarily incurred in making the debt effectual; subject to the various modifications which the Court have recognised in estimating the extent of that liability,[1] in different circumstances. In like manner, if the award contains a decerniture against a party, *ad factum prestandum*, under the penalty contained in the submission, the legal operation of the penalty would appear to be the same as if it had been adjected to a simple personal contract or bond, *ad factum prestandum*, of the same tenor with the award. The doctrine as to the practical effect of a penalty adjected to such a contract, involves various nice questions in its application, but these are not proper to the law of arbitration; they belong, on the contrary, to the general law of Scotland, on the subject of contract obligation.[2]

436. It may be doubted whether the use of penalties in a submission has been made as fully available in practice as it might be. Con-

the obligation on payment of the penalty." See also Broomfield, August 11, 1753 (9446).

It would seem to have been otherwise by the law of Rome. "Jure Pandectarum, sententiæ ab arbitro compromissario dictæ, is solus effectus est; ut, si ei paritum non esset, committeretur pœna compromissa: cæterum, nec actionem Judicati, nec exceptionem rei Judicatæ, parit."—Pothier ad Pand., L. 4, t. 8, sec. 4, art. 3 (54).

[1] Cooper, Jan. 4, 1740 (10044); Young, May 21, 1796 (10053); Gordon, Nov. 27, 1761 (10050); Allardes, June 19, 1788 (10052); Ramsay, June 22, 1826, 4 S. 744; Inglis, June 23, 1825, 4 S. 114.

[2] 1 St. 17. 20; 3 Ersk. 3. 86; Bairdner, July 27, 1706 (10043); Wright, Feb. 9, 1826, 4 S. 440; Mackenzie, June 18, 1811, F. C.; Bell's Pr., sec. 34; 2 Hunter, 464, and 497, *et seq.*, [4th ed., 495, and 531, *et seq.*]; Kames' Pr. of Eq., i. 349; Anderson, Feb. 6, 1836, 14 S. 447. See the difference between proper penalty, and pactional or liquidate damages, fully discussed in Johnston, Mar. 6, 1861, 23 D. 646.

sidering the many recommendations which the system of arbitration possesses, it would probably be much more resorted to, if effectual means existed for cutting off undue delays in expediting the progress of a submission. This might apparently be accomplished, to a considerable extent, by intrusting to the arbiter the power of imposing moderate penalties (not exceeding a certain maximum) on either party who failed to lodge a paper, for example, or to lead a proof, or to be prepared for a debate at the time fixed, and who had no sufficient excuse to offer for such failure. At present, an arbiter's power of compulsitor appears to consist chiefly in cutting off, from the dilatory party, the power of leading his proof, or debating his case, etc. But this is a power of so severe and unsatisfactory a character, that an arbiter will not resort to it on slight occasions; whereas the power of exacting a moderate penalty, as it might be freely and constantly enforced, for every default, would have a strong practical tendency to insure regularity and despatch.[1]

CHAPTER XIV.

POWERS AND DUTIES OF THE OVERSMAN.

437. It has already been noticed, that where two arbiters are appointed, it is necessary to guard against the contingency of their disagreeing in opinion, by providing, in that event, for the devolution of the submission upon an Oversman or Umpire, with whom it then rests to decide the matters in dispute by his award. The subject of Devolution has already been considered (p. 185), but a few observations may be added respecting the position and the office of the oversman.

438. When a minute of devolution has been executed, the first act of the oversman should be to sign a minute accepting of the office; unless, indeed, the oversman has been appointed in the outset of the submission, and has accepted before the devolution was executed. The oversman's minute of acceptance is in the same terms as that which an arbiter signs at entering on his office.[2]

439. An oversman will learn the extent of the subject-matter

[1] It must be admitted that some difficulties might be experienced in attempting to introduce this suggestion into practice. But they do not appear to be insurmountable. Some observations on the subject will be found in the Appendix.

[2] See Appendix: Minute of Acceptance.

devolved on him, and of his powers in dealing with it, from the terms of the contract of submission, taken together with those of the minute of devolution, and of any part-awards which may have been pronounced by the arbiters.

440. An oversman should, immediately after acceptance, examine the date of the last prorogation of the submission, so as to ascertain at what time he himself should execute a prorogation, if so authorised. Otherwise, a lapse of the submission may unexpectedly occur, as the act of devolution does not, in itself, prorogate the submission, or add in any degree to the length of the term of submission then current.[1] Undoubtedly, it is the especial duty of the clerk to the submission to keep the arbiters and oversman duly advised respectively, as to the time when a prorogation is requisite. But instances of remarkable and fatal omission in this respect are not unknown; and it may be useful that the arbiters and oversman should themselves keep an eye on this vital matter also.

441. An oversman will take an early opportunity, after accepting the submission, to examine carefully into the state of the process of submission, in order to make up his mind as to the course which he ought to follow in dealing with it. He will, accordingly, take into consideration any proof and written pleadings which may have been before the arbiters; and also any notes of opinion which may have been issued by them. It is generally desirable (though not essential) that he should be in possession of the views respectively entertained by the arbiters on the matters devolved on him. But all this is for his own information merely; and, as it is by his own judgment and conscience exclusively that he must be guided in making up his award, he is under no obligation to content himself with the proof which may have been led, or the pleadings which may have been lodged before the arbiters. He may order further proof or pleadings, if he thinks fit.

442. Generally speaking, an oversman's duties and functions, on all questions relating to the leading of proof, or hearing of parties, or general conduct of the submission, are the same as those of the arbiters, which have been already considered in the preceding chapters of this Book. An oversman is, in effect, a sole[2] arbiter, both in regard to his powers, and in regard to his duties.

443. It follows, therefore, that if there has been proof led before the arbiters, and written pleadings lodged on the merits, and if the oversman conscientiously considers that his mind is thereby sufficiently instructed by these to form a just judgment on all the matters in

[1] *Supra*, sec. 369.

[2] "In a submission, with a power of devolution, the devolution made by the arbiters is just a submission in succession to the primary one, either wholly, or *pro parte*."—Per L. Wood, in Lang, Nov. 23, 1852, 15 D. 42.

dispute, he is entitled to give forth his award without further pleadings, whether oral or written, and without further proof.[1]

444. But it seems almost always to be advisable, that the oversman should issue Notes of his own opinion to the parties, and should also afford them an opportunity of being heard by himself before he gives forth his award. Undoubtedly, there may be cases where an oversman may, with perfect propriety, dispense with this; but, in general, his procedure will neither be as satisfactory to the parties, nor as considerate in itself, as it ought to be, if he gives no opportunity of a hearing before himself, in the event of either party desiring it.

445. If the submission has been ambiguously expressed in regard to the extent of the powers conferred on the oversman, the Court have inclined to hold them to be presumably the same as those conferred on the arbiters, at least where no reason was indicated in the submission why the parties should have desired to make a distinction in this respect between the arbiters and the oversman. To perform similar duties, the oversman has presumably received similar powers. Accordingly, in both of the cases of Macbryde and Glover, when an attempt was made to reduce an oversman's award, on the ground that the submission had fallen before it was pronounced, inasmuch as the oversman had received no power of prorogation, the Court held that, according to the fair and reasonable construction of the submission, the same power of prorogation had been bestowed upon the oversman as confessedly had been bestowed upon the arbiters.[2] But it will be observed, that the power of prorogation, when exercised by an oversman, is incapable, in its own nature, of prolonging the term of the submission, excepting in regard to those subjects which have been devolved on himself,[3] and over which alone he possesses jurisdiction.

[1] Parties named an oversman at the outset of the submission; he attended with the arbiters at the taking of the proof, and was present with them at an inspection of premises, and at the hearing of parties. This was done with a view to his thereby informing his mind, so as to prepare him for acting as oversman in the event of a devolution. Thereafter, the arbiters differed, and devolved. The oversman issued a draft of his award, upon which one of the parties applied to be heard before him, but did not allege any special ground for the application. The oversman refused the application, and issued his award. In a reduction, it was pleaded that as the only hearing which had taken place in the presence of the oversman was then necessarily addressed only to the arbiters, and as the oversman had not been then clothed with his office by devolution, there had in reality been no hearing before him *qua* oversman at all. The Court, however, sustained the award, holding that it was no objection that the oversman had pronounced it on information acquired in his capacity of oversman-elect.—Crawford, Feb. 4, 1858, 20 D. 488.

[2] Macbryde, July 21, 1748 (657); Glover, Feb. 11, 1805, 4 Paton, App. 655. See cases more fully noticed *supra*, pp. 182, 183, notes.

[3] Lang, May 8, 1855, 2 Macq. 102. See *supra*, p. 184, notes.

446. The result of the opinions in Lang's case seems to be, that under the ordinary contract of submission, the jurisdiction conferred respectively on the arbiters and the oversman, is of a "substitutional" character, the latter only commencing where the former ends; and that, when the arbiters have executed a devolution upon the oversman, whether of the whole submission or of a part, they themselves are thereby entirely *functi*. No inconvenience need ever arise from this, as the usual and proper course, when a devolution becomes necessary, is for the arbiters to exhaust the submission, so far as they are agreed, by an interim decree, if they have power to pronounce one, and to devolve the submission *quoad ultra*; or else, if they have no such power, in respect of their differing in opinion, to devolve the whole matters submitted on the oversman. In either way, the connection of the arbiters with the submission ceases from the date of the devolution. And in either way, the whole submission is appropriately disposed of, in accordance with the powers conferred respectively on the arbiters and oversman.

It appears unnecessary to add further details respecting the powers or duties of the oversman, or sole arbiter, as this would only involve a recapitulation of what has been already said respecting the powers and duties of arbiters.

BOOK IV.

THE AWARD, OR DECREE-ARBITRAL.

---

447. "A DECREET-ARBITRAL, or award, is a sentence proceeding upon a submission or reference to arbiters."[1] It embodies the deliverance by which the arbiters decide, in whole or in part, as the case may be, the subject-matters of the submission.

448. In construing an award, it would appear that the law of Scotland[2] follows the same rule which has been adopted in England, where it is held that "an award is to receive a liberal and sensible construction, and, as far as possible, to be governed by the intent of the arbitrator."[3]

449. As an award is the official sentence of an arbiter, it requires to be duly executed and signed by him before the expiry of his office. After the close of the term of the submission, the arbiter is *functus officio*, and possesses no more power to pronounce, or even to sign, a sentence, binding on the parties-submitters, than to pronounce or sign a sentence binding upon any other third parties whatever.[4] Where there are more arbiters than one, all the arbiters (or a quorum, as the case may be) must have signed before the submission expires. The necessity of signing before becoming *functus officio* applies equally whether the arbiters are to be rendered *functi* by the expiry of the submission, or by the devolution upon an oversman, of so much of the submission as the arbiters had not themselves agreed upon.[5]

450. Instances have repeatedly occurred, in which arbiters, agreeing with each other, have expressed their views or opinions on the

[1] 4 Ersk. 3. 29; 1 Bankt. 23. 20. [2] 4 Ersk. 3. 32.

[3] Russ. 488, [4th ed., 491]. "The Courts of law will always construe awards, and hear motions respecting them, with a desire to sustain the judgment of the tribunal which the parties have selected, and which, in so many instances, acts most beneficially for them."—Russ. 674, [4th ed., 672]. At the same time this favourable leaning will not be carried too far, because "awards are to be construed sensibly, as all other instruments."—Per Coleridge, J., in Stonehewer, Jan. 14 1845, 9 Jur. 203.

[4] Hamilton, Jan. 30, 1608 (643); Freeland, Feb. 28, 1666 (646); Pitcairn, Dec. 2, 1680 (647); Donaldson, Jan. 26, 1770 (Dicty. Arbn., Appx. 1).

[5] Lang, Nov. 23, 1852, 15 D. 44. *Supra*, p. 184.

subject-matters of the submission, in signed Notes or Minutes, and have afterwards become *functi* before executing an award. In these cases, it has long been held that the defect was irremediable,—the office of the arbiters being gone, and no power thereafter remaining with them to execute a formal award, even in precise conformity with their own signed minutes or notes.[1]

451. Some of the requisites of an award appear to relate more particularly to its form, and others to its substance. These may be taken in their order.

452. With respect to the form of an award, it is necessary, in order to its being valid and effectual, independently of all aid from homologation, or *rei interventus*, that it be either holograph[2] in the case of a single arbiter, or a probative writ in the case of one or more arbiters.[3] It must, as already noticed, be fully executed before the expiry of the submission;[4] but it is not necessary, where there are more arbiters than one, that all of them should sign at the same time.[5]

453. But a party may be barred by homologation, or by *rei inter-*

[1] "Since the case of Haliburton in 1708, and the second case of Short in 1711, it appears to me that all the decisions on this matter are consistent, and all lead to this result—that no informal Notes of arbiters, though signed and expressing their opinion at the time, have any effect as expressions of opinion, binding upon the parties-submitters." "It is said that the Notes are good as a warrant for the execution of the subsequent formal decree-arbitral. But if such Notes could be viewed in that light, how could they have been reduced, as in the case of Runciman, and other cases referred to? If warrants, they must have stood in that character; and the result must have been, not the reduction of the valid warrants for a formal decreet-arbitral, but the sisting of the cause, until the arbiters had an opportunity of reducing them into the proper and authoritative form."—Per L. Fullerton, in Lang, Nov. 23, 1852, 15 D. 44. See also Runciman, May 24, 1831, 9 S. 629; Haliburton, July 28, 1708 (16970); Short, July 3, 1711 (16867).

[2] E. of Rothes, Dec. 9, 1635 (12605), and 1 Suppt. 358. See also 1 Bankt. 23. 8, observing, however, that, in so far as the passage relates to prorogations, the law is now different.

[3] Percy, Nov. 25, 1808, F. C.; Haliburton, July 28, 1708 (16970); Short, July 3, 1711 (16867). In one old case, where four arbiters subscribed *unico contextu*, "the Lords found that, there being four judges subscribing, they might be witnesses to others, as in charters subscribed by a convent."—Moncur, June 22, 1615 (644). This should not now be relied on. [In the case of Dykes *v.* Roy, Jan. 13, 1869, 7 Macph. 357, an award *in re mercatoriâ*, signed by the arbiter, and of unchallenged genuineness, was sustained, although neither holograph nor tested.]

[4] At an earlier period, some decisions of a different import were pronounced: Forrester, Mar. 27, 1633 (645); E. of Crawford, Jan. 4, 1699 (649); but these are now overruled by the cases above quoted. See an instance, in which an attempt to supplement a defective award, *ex post facto*, was disallowed by the Court: Campbell, July 2, 1831, 9 S. 875.

[5] M'Quaker, Mar. 19, 1859, 21 D. 794.

It would appear to be otherwise in England. "Where there are several arbitrators, all should execute at the same time, and in presence of each other."—Russ. 243, [4th ed., 233]. See also Anning, Jan. 19, 1858, 27 L. J., 145 Ex.

ventus, from challenging an award, in respect of its informality. In any case of ordinary personal contract, where the rights of the parties, *hinc inde*, depend upon their mutual consent, the equitable doctrine applies, which allows the adhibition of that consent to be proved by acts of homologation, or the power of repudiation to be barred by acts of *rei interventus*. The law of submission is, for the most part, essentially contract-law; and the equitable doctrine in question, where there are facts to support it, will bar the challenge of an informal award.[1]

454. It would appear, from some old decisions, that formerly parties had occasionally specified, in the submission, a precise time and place for pronouncing the award. But this practice, which does not appear to possess any advantage, and which may be attended with much inconvenience, seems to have entirely disappeared.[2]

455. The general form and tenor of the award will best be seen by referring to the examples of the more ordinary class of awards, which are given in the Appendix. The chief clauses of the award are the Narrative or Introductory Clause, the Adjudicative Clause, and the Testing-Clause. There is generally also the important ancillary Clause of Registration.

456. The narrative or introductory clause sets forth, in terms as concise as may be consistent with perspicuity and accuracy, the names and designations of the arbiters—the particular submission under which they are acting, and their acceptance of the same—the parties-submitters—and the subject-matters submitted. In making these several statements, it is necessary to be guarded and accurate. It will generally be found advisable to describe the matters submitted, as nearly as possible, in the same language which has been used in the submission itself. The powers conferred on the arbiters are also often referred to; but this is not material, unless where powers of an extraordinary or special kind have been bestowed. The introductory clause then usually gives some succinct account of the procedure which has taken place under the submission, and of the means adopted by the arbiters for informing their minds, such as proof, hearing, inspection of premises, etc.[3]

[1] Dundee, Perth, etc., Ry. Co., Jan. 31, 1851, 13 D. 552; Telfer, Jan. 21, 1735 (17032); Hepburn, Dec. 1, 1736 (5658); Taylor, Nov. 25, 1800, F. C. [Elgin Lunacy Board *v.* Bremner and Elder, July 10, 1874, 1 R. 1155; affd. June 24, 1875, 2 R., H. L., 136. See also note 3, p. 45.]

[2] Bonar, Mar. 7, 1505 (635); Campbell, Jan. 28, 1612 (655); Balf. Arb., 414.

Apparently the practice was borrowed from the Roman Law, which required that an arbiter should deliver his award in the presence of the parties; *utraque parte præsente*.—Voet ad Pand., L. 4, t. 8, sec. 15. "Plane diem, compromisso insertum, referre, id est, antevertere, et ita maturius adjudicare, arbiter, invitis litigantibus, prohibitus est."—*Ibid.* sec. 17. "Necesse, insuper, ut loco debito, feratur sententia."—*Ibid.*

[3] It has been held in England, with respect to some false recitals, that they did not vitiate an award. The award by an umpire "is not vitiated by a mistake in

457. This prepares the way for the essential and distinctive clause of the award, viz., the Adjudicative clause, which embodies the sentence or judgment of the arbiters disposing of the matters submitted, by pronouncing such findings or decernitures as they hold to be requisite and appropriate. According to invariable practice, this clause states, as preliminary to setting forth the judgment, that the arbiters are "now well and ripely advised" in regard to the matters submitted, and that they have "God and a good conscience before their eyes." Nothing can be more appropriate than this solemn declaration, which is made by the arbiters, as the immediate preface to the delivery of their judgment. This appears, in truth, to be the equivalent, in this private procedure, to the oath *de fideli administratione officii*, which a public judge takes at entering upon his office. And considering the amplitude of the trust which is reposed in an arbiter, in respect to which his own "good conscience" is so largely relied on, in place of all other safeguards, the importance of his recording in his award this solemn appeal to the Great Searcher of all hearts, is striking and undeniable. No arbiter will ever omit these words intentionally, nor will any careful clerk to a submission ever fail to see that they are duly set forth.

458. It has been doubted, however, whether the omission of these words would be fatal to an award. Bankton has stated his opinion, that such an omission would be "no nullity."[1] And there are strong reasons which might be adduced in support of that opinion. It does not seem that the mere omission of these words could, *per se*, rear up a case of either falsehood, or bribery, or corruption, against the arbiters, according to any construction of the Act of Regulations, however strained. And even taking the broader ground, that gross violation of duty by an arbiter towards the parties is a reason for setting aside his award; and further, that his delivering an award without having God and a good conscience before his eyes at the time of doing so, would undoubtedly be a gross violation of his duty; still it would seem

the recital of the award in the Christian name of one of the original arbitrators who appointed the umpire, or by a statement that the umpire was appointed by the parties, when he was, in fact, chosen by the arbiters."—Russ. 253, [4th ed., 243].

[1] 1. 23. 11. It appears from the Session Papers in a recent case (MacNair, Feb. 16, 1855, 17 D. 445), that an award was given in the form of a missive addressed by the oversman to the parties, which briefly and concisely stated his opinion, without the use of any words of style, and, in particular, without the declaration that, in delivering his opinion, he had God and a good conscience before his eyes. The award was keenly attacked on other grounds; but no reason of reduction was rested on the omission of these words. It is true, that the whole procedure was of a less formal character; but that would scarcely suffice to dispense with the words in question, if they were of the essence of an award. Yet it seems probable, that, in omitting the words in question, the award in MacNair's case is only an example of what is not uncommon, where the procedure is not in professional hands.

to be a very difficult position to maintain, that the mere absence of the words in question from the body of the award, was to be held *probatio probata* of the fact, that the arbiter had *not* God and a good conscience before his eyes in reality, though he had inadvertently omitted to say so.[1] It is unnecessary, however, to pursue further a speculation which can at present be of little practical value. The law on this subject will not be known until some decision of the Court, in an actual case, shall settle the question. In the meantime, every arbiter will, of course, carefully observe, that these most important and appropriate words are introduced into his award, consistently with invariable practice.

459. The adjudicative clause disposes of the expenses, including the account to the clerk of submission, as well as of the merits of the submission. It also ordains the execution of any discharges or other deeds *hinc inde*, or the performance of any facts, with which it may belong to the arbiters so to deal in the particular case. It enjoins fulfilment of the sentence, under the penalty contained in the submission, over and above performance. And where the arbiters are empowered to that effect in the submission, they also appoint or authorise registration of the submission, the acceptance, and the award; as well as of the prorogations, if any have been made. In the case of an award by an oversman, the registration will further include the devolution, and any prorogations which may have been made by the oversman himself.[2]

460. The Testing-clause of the award is similar to the testing-clause of any other probative writ. It must set forth the name and designation of the writer of the award, and of each of the subscribing witnesses who attest the signatures of the parties; and also, where the award is not written on one sheet, it must state the number of pages of which it consists. It should likewise mention the date and place of subscription.[3]

461. It was on one occasion objected, that the award was not written by the clerk to the submission, but by another person whom

[1] See, however, the view indicated on this subject in Russell's "Theory of Conveyancing," p. 117, and Parker's Notes, p. 170. It may be also noticed, on this subject, that, in the pleadings in Woddrop, Feb. 4, 1794 (628), the following passage occurs in Finlay's answers, p. 21, to Woddrop's reclaiming petition (Sess. Pap.):—"In a very late case, which still depends in Court, a decreet-arbitral was challenged because the arbiter had not said in his decreet that he had God and a good conscience before his eyes. Your Lordships, in that case, allowed the arbiter to be examined in explanation of his decreet-arbitral; and he was accordingly examined, in consequence of a remit to the Lord Eskgrove, Ordinary." On the other hand, an opinion of counsel on a joint-memorial, which was held to amount to a submission and judgment, does not require the customary appeal to God and a good conscience.—Fraser, July 29, 1850, 7 Bell's App. 171.

[2] See *infra*, B. VI. Chap. x., Action, etc., upon an award.

[3] Menzies' Lect., 117 *et seq.*, (4th ed., 124); and 19 and 20 Vict. c. 89.

the arbiter employed for that purpose, notwithstanding that there was a clerk to the submission, who had been duly appointed by the arbiter. The objection was repelled.[1]

462. In another case it was maintained, that, as it is illegal in the clerk of a Court to act as agent before the Court, so it was at least equally objectionable, that the agent of one of the parties had acted as clerk to a submission, and had written the award, for the signature of the arbiters. In the particular circumstances, it would appear that this objection had not been much pressed on the Court; but those Judges who adverted to this point, intimated, that while it would have been a grave objection, if the agent of one of the parties had acted as clerk to the submission (an officer to whom the arbiters often look for advice), they did not hold that the facts of the case made room for the objection to apply.[2]

463. Where an award is made in England, Holland, or elsewhere, and is duly authenticated according to the law of the place where it is executed, it will be held valid in Scotland, though not probative by the law of Scotland.[3] But this rule will not apply, if the contract of submission itself has prescribed the execution of an award according to the Scottish form.[4]

464. With respect to another particular connected with the formal execution of an award, viz., its being dated on a Sunday, the following doctrine has been delivered by Bankton: "It is regular and decent not to pronounce an arbitral decree on a Sunday, or other holy day," "but I conceive it would be no nullity."[5] There are various cases, in which private deeds, executed on Sunday, have been sustained, and which would seem to support Bankton's opinion. It is otherwise with public judicial acts, of a civil nature, such as arrestment, inhibition, etc., which are null, if executed on a Sunday.[6] But a contract of sub-

[1] E. of Hopetoun, Mar. 6, 1856, 18 D. 739. See interlocutor, p. 772.

[2] Mowbray, June 2, 1848, 10 D. 1102. See opinion of L. Medwyn, p. 1119, and L. Cockburn, 1124.

[3] See B. VI. Chap. xiv.

[4] E. of Hopetoun, Mar. 6, 1856, 18 D. 739. It may also be noticed, that in this case, the question was raised, whether a different test of the authenticity of a foreign award might not be legitimately resorted to.

[5] 1 Bankt. 23. 16. The reason which he assigns is, that it is "an office of humanity to agree parties by ending controversies amicably." Without relying too much on this as a specialty, there are various analogous cases, in which the private deeds of parties have been held legally valid, though executed on a Sunday; and which could not have been so decided upon any principle which would not equally support the validity of an award. Thus, a bond, signed on a Sunday, was held valid—Duncan, 1684 (15003); and a bill was held valid, though signed on a Sunday.—Macpherson and Co., 1824, reported in Thomson on Bills, 2d ed., p. 65, [ed. 1865, p. 39]. In this case, the interlocutor pronounced by L. Mackenzie, Ordinary, was acquiesced in. It has been enunciated, as a general doctrine, that "bargains and engagements, made on Sunday, are not null in Scotland."—Bell's Pr., sec. 44.

[6] Oliphant, Feb. 3, 1663 (15002); Forbes, Jan. 17, 1702 (15003).

mission, and the award following thereon, belong to the class of private contracts.

465. In the case of an award by an oversman, it must set forth, *in gremio*, that the arbiters had differed in opinion, as it is only in that event that the authority of the oversman could, under the terms of the submission, be called into operation. This statement has been held to form so essential a portion of such an award, that the absence of it laid the award open to reduction. An offer of proof by the oaths of both the arbiters, that, in point of fact, they had differed before devolving the submission, was rejected by the Court, as incapable of curing the defect, which was inherent in the constitution of the award,[1] as it stood at the close of the submission.

466. In the ordinary case, an award can be issued only in favour of one of the original parties to the submission, or his representative, when the submission includes representatives. In one instance, however, where a party, during the dependence of a submission, assigned his claim, and whole right and interest, specially empowering his assignee to obtain an award in his own name, it was held competent for the arbiter to pronounce an award which narrated the assignation, and decerned in favour of the assignee. But, considering the extreme delicacy involved in such a proceeding, as is pointed out in the note of L. Moncreiff, Ordinary in the case, it would seem prudent, in the meantime, to regard the decision as a precedent only in circumstances which are substantially the same with those which there occurred.[2]

467. With respect to the requisites of an award, in point of substance, these have necessarily been to a considerable extent already investigated, especially when examining the powers and duties of arbiters. Some of the following topics may, therefore, be more lightly touched upon than would otherwise have been required.

468. Every award must, in substance, be essentially the actual judgment or sentence of the arbiters who pronounce it. It must be the embodiment of their own opinion, as private judges, on the merits

[1] Gordon, Nov. 30, 1716 (655). The Court "found the decreet-arbitral, not bearing the arbiters to have varied, null, and that the nullity could not be supplied by an after probation." See also 4 Ersk. 3. 29. [Frederick *v.* Maitland and Cunningham, July 7, 1865, 3 Macph. 1069.]

In the subsequent case of Dunsmoor, July 30, 1745 (656), the submission bound the parties to implement "whatever the two arbiters, or, in case of variance, any one of them, with the oversman, should adjudge," etc. An award was pronounced, which was signed by one of the arbiters, and by the oversman. It did not bear that the arbiters had varied in opinion. A suspension was therefore brought, founding upon the above case of Gordon. But the Court sustained the award, apparently holding that an award, signed by one of the arbiters and the oversman, bore, *ex facie*, evidence of the variance of the other arbiter who had withheld his signature. See observations on this class of cases, *supra*, p. 190 *et seq.*

[2] Henry, Jan. 29, 1835, 13 S. 361. See, in connection with this subject, Baillie, May 19, 1829, 7 S. 619.

of the case submitted to their arbitration. When, therefore, a document which purported to be an award *ex facie*, and which in all merely formal requisites was a regular award, proved to be, in reality, not the judgment of the arbiters at all, but only a colourable form given to an agreement previously made between the parties themselves, it was held, in a reduction of the award, that it was not truly an award, and could not be defended upon any of the pleas applicable to a genuine award. It was accordingly reduced.[1]

469. Accordingly, where it appeared *ex facie* of an award by two arbiters, that, with respect to one of them, it was impossible to hold that he had applied his own mind, as referee, to the matters referred, and had formed his own opinion thereon, it was observed by L. Wood, that the award could not be binding. There was no judgment given on this point, however, as the procedure in question was found null on other grounds.[2]

470. An opinion does not, however, cease to be an arbiter's own, merely because he has derived valuable assistance from others in forming it. If, for example, he thinks it right to be informed on a point of law, in making up his opinion, he may direct the advice of counsel to be taken, and adopt it when received, as furnishing him with the best means of forming a correct judgment on that part of the subjects of his deliberation. Or if he has to make up his mind regarding the state of the workings in a coal-pit, for instance, or the alleged defective structure of a building, etc., he may not only be

[1] The judgment of the House of Lords declared, "that the alleged submission and decree-arbitral ought not to be considered as having, in law, the effect of a submission or decree-arbitral, but as a form adopted, by which an agreement previously made between the parties to the said submission was concluded."—Maule, May 10, 1814, 4 Dow 391.

Such procedure has been expressly termed in America "a compromise wearing the dress of an award."—Per Marshall, C. J., in Holker, Mar. 1, 1813, 7 Cranch 436.

The Roman law was apparently the same. "Nullum quoque arbitrium esse, Paulus monet, quo id actum fuit, ut certam sententiam dicat arbiter, seu quo convenit, quid pronunciandum sit. Cum enim omnis vis sententiæ, ab arbitro ferendæ, accedat a partium conventione, ineptum fuerit, eum ad illa adhuc tractanda ac terminanda accedere, quæ litigantium transactione jam ita dirempta sunt, ut non major his firmitas ab arbitri judicato addi possit."—Voet ad Pand., L. 4, t. 8, sec. 11.

See this point also touched on in Mackenzie, Dec. 19, 1840, 3 D. 318; and Mar. 9, 1843, 2 Bell's Apps. 43.

[2] Gillon, Jan. 14, 1859, 21 D. 243. L. Wood added, as to another feature in this case: "I think the whole procedure, at the best, resolves itself into a compromise made by the two referees: one of the pursuer's claims being, as proposed by Sellars (a referee), given up; while, on the other hand, he agrees to take £20 for the other, with all the law charges, to which the other referee (Stewart) agrees. But if so, what was done was beyond their powers, and neither of the parties could be bound by it." Such a proceeding was just another variety of a colourable award; a compromise wearing the dress of an award. It did not embody the true arbitral opinion, either of the one referee or of the other.

guided by the reports which men of skill shall make,[1] under his remits to them; but unless he is himself a man of excellent skill, he will probably be better enabled thereby to form a sound opinion, than by any unaided inspection of his own. Nay, an arbiter may give up his original opinion, and adopt entirely that of his co-arbiter, provided that he does so because, on full consideration, he thinks his co-arbiter's opinion is rested on the soundest foundation, and, accordingly, his own mature opinion coincides with it. It is, indeed, for this very purpose that arbiters compare their views with each other, in order that both may concur in adopting, as their own, that view which they ultimately hold to be the most consonant with reason and justice. All that is necessary is, that the arbiter, in the free exercise of his discretion, shall have applied his own mind, *qua* arbiter, to the sources of information before him, and shall, through that medium, have actually formed the opinion for himself which is embodied in the award.[2]

471. "Every award has its force, not by virtue of the award itself, but by virtue of the previous contract of parties, giving it effect." Hence, in considering any question as to the validity of awards, "we must never lose sight of this consideration, that we are merely determining upon the construction to be put upon the contracts of parties;" "and what we have to consider is, whether the award which was then made, is an award which the parties agreed should be binding upon them."[3]

472. An award, being the judgment or decree given on the questions between the parties, and being designed to be operative and authoritative in regulating their respective rights and obligations, should itself expressly decide the matters in issue. A mere enunciation of the arbiter's inferences or suggestions, or a statement of proposals for the acceptance of the parties, however reasonable, falls entirely short of an award.[4]

473. As an award contains the arbiter's answer or deliverance which finally closes the submission, it should be of a complete and

[1] See observations of L. Wensleydale, in Caledonian Ry. Co., Mar. 23, 1860, 32 Scot. Jur. 472.

[2] In England, it is held that "arbitrators may consult other persons without the assent of the parties, provided they act on their own judgment; but if they bind themselves to adopt the opinion of a person (whom the parties have agreed they may consult), the award will be bad, as not being, in fact, their award."—Whitmore, June 2, 1860, 29 L. J. 402, Ex.

[3] Per L. Cranworth, C., in Lang, May 8, 1855, 2 Macq. 94.

[4] In England, a case occurred which afforded a strong instance of the absence of the essential element of deciding on the matters submitted. The arbiter intimated in writing to the parties, that, "to meet the circumstances of the case in a liberal manner, I propose that B. (one of the parties) should pay to A. (the other party) £10." This was held to be no decision of anything, and consequently no award.—Locke, 1833, 2 N. and M. 336.

exhaustive character. It should leave none of the disputed matters undecided, unless special power has been given in the submission to pronounce part-awards.[1]

474. It is equally essential that an award should not go beyond the submission, in any respect, or decide matters which were not submitted. It should be precisely commensurate with the submission; deciding all the matters submitted, and deciding nothing more.

475. When an award decides anything beyond what was submitted, the excess is *ultra vires* of the arbiter, and possesses no validity. If the excess merely involve matter which is separate and distinct from the other matters in the award,—and if, moreover, it be of such a nature that the decision of it plainly did not affect, in one way or other, the decision of the other matters which were duly within the arbiter's power,—then the only part of the award which will be invalid will be that part which was *ultra vires*. But, on the other hand, if the part which was *ultra vires* plainly affected the decision of any portion of the rest of the award,—nay, if it be not apparent that the rest of the award would have been exactly the same, supposing that the unwarranted part of it had never been pronounced,—it would appear that the whole award is invalidated; because it will be then impossible to say what award the arbiter would have pronounced, if he had kept within his powers under the submission.[2]

[1] See *supra*, B. III. Chap. x.; some observations on the arbiter's duty to exhaust the submission. In England, where the submission binds the arbitrator to decide all the matters submitted to him, it would appear that an award which leaves one subject undecided is bad *in toto*.—Russ. 258, 261, and 264, [4th ed., 248, 251, 253].

[2] "I can conceive, where the matters are not mixed, that a decree-arbitral may be set aside so far as *ultra vires*, and supported so far as *intra vires*." But, "if the decree, so far as *intra vires*, is indirectly influenced by that on the matter *ultra vires*, it must be set aside altogether."—Per L. Glenlee, in Reid, Dec. 15, 1826, 5 S. 130.

In whatever shape the objection of *ultra vires* appears, it will vitiate the award, in whole or in part, according to circumstances. In Whitehead, Nov. 16, 1833, F. C., an award of expenses against a party personally, who had merely sisted himself in the submission, in the character of trustee for one of the parties, was set aside. See note as to this, p. 229. In Napier, Nov. 29, 1844, 7 D. 166, an award, which granted more than was asked for, was set aside. In Macilhose, July 13, 1738, 5 Suppt. 204, an award of a larger penalty than was contained in the contract of submission was restricted to the penalty therein stated; and, *quoad ultra*, was sustained. In Mackenzie, June 11, 1751, Elch. (n) Arb. 9, the Court distinguished between a true excess, and that which was merely colourable; disregarding the latter and sustaining the award. So also in Macgregor, May 20, 1847, 9 D. 1056, where a landlord was bound to put houses, etc., in repair to an arbiter's "satisfaction," an award was not held *ultra vires*, in merely decerning for such sums as the arbiter held sufficient to make the repairs in question; it being observed by L. Jeffrey, that "money is a universal solvent, and universal equivalent for every obligation that can be estimated in money, and which requires nothing but money to its due accomplishment." In Crawford, Dec. 25, 1702 (6835), an award

476. An award should be clear and perspicuous in its language, and free of ambiguity; so that the parties may learn with certainty, by perusing it, what are their respective rights and obligations, as settled by the arbiters.[1] After the delivery of an award, its legal import becomes matter of construction rather than of evidence. If its terms be ambiguous, the probable result will be, a litigation between the parties to have its import ascertained. And if the Court, after employing all legitimate aids in attempting to clear up the ambiguity, shall nevertheless find themselves unable to determine the true meaning, the award will be found void for uncertainty, and the submission will thus be rendered abortive.[2]

decided certain special matters which were submitted; and, moreover, ordered the parties to execute general discharges, *hinc inde*. This last order was reduced, as *ultra vires*; the rest of the award was sustained. Compare this case with Wilson, June 4, 1831, 9 S. 680; and see the observations of L. Moncreiff as to the arbiter's power to order the discharge, there executed by the husband. In Jack, Mar. 6, 1777 (Dicty. Arb., Appendix 5), the Court reduced a finding, by which arbiters had awarded a fee to themselves; but *quoad ultra* sustained the award, in respect that the erroneous finding did not proceed from corrupt motives, and was "totally distinct from, and unconnected with," the rest of the award. In Johnstone, July 10, 1817, 5 Dow 247, L. Eldon, C., reducing part of an award, found that the arbiter "had no authority so to decern and ordain, but that this ought to be considered an excess, not vitiating the other parts of the decreet-arbitral." On the same day, in another appeal at the instance of the same party (5 Dow 266), a judgment was pronounced, which declared two of an arbiter's findings to be *ultra vires*, but *quoad ultra* sustained his award: the judgment, as to this, was, "Find that this excess in the decreet-arbitral ought not to affect its validity further than to rectify said excess." See also Montgomery, June 13, 1798 (631); Ferrier, Jan. 28, 1843, 5 D. 456, affd. April 18, 1846, 4 Bell's App. 161; Grosat, Jan. 24, 1739 (626); Gairdner, July 10, 1741 (627), Elch. Arb. 5; Stewart, Feb. 21, 1822, 1 S. 313; Kidd, June 19, 1810, F. C. [See also Cox Bros. *v.* Binning & Son, Dec. 18, 1867, 6 Macph. 161.]

In N. Brit. Ry. Co., Nov. 27, 1855, 18 D. 102, a plea of *ultra vires* was successfully met, by showing that the parties-submitters, by their own actings and pleadings before the arbiter, had enlarged the limits of the original submission. See also Gye and Co., May 15, 1835, 1 S. and M'L. 747.

The law of England would appear to deal with this subject in the same manner as the law of Scotland. "If the portion of the award containing the excess can be entirely separated, that alone may be set aside, while the rest will stand good; but if the Court cannot see that that part of the award, made in the proper exercise of his authority, is wholly unaffected by the objectionable provision, the entire award must fall.—Russ. 674, [4th ed., 673].

[1] [Alexander *v.* Bridge of Allan Water Co., Feb. 5, 1869, 7 Macph. 492.]

[2] The law of England appears to be the same.—Russ. 283, 284, 285, and 291, 292, [4th ed., 271, 272, 273, and 279, 280]. But it is held there, as it would apparently be held here, that "if the award give the rule for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain, according to the general rule, *Id certum est quod certum reddi potest.*"—Russ. 288, [4th ed., 276]. "Though the award do not fix the amount, yet, if it refer to any instrument, by reference to which the sum may be readily computed, it is good."—*Ib.* 289, [4th ed., 276]. The case of Paterson, May 15,

477. It will be kept in view, that, in questions of this nature, the ex-arbiters are not allowed to be called in, to state what had been their meaning in the several findings of their award. For certain purposes, ex-arbiters may be examined,[1] but not to the effect of putting their own interpretation upon the terms of their delivered award. Independently of the risk of ex-arbiters being tampered with by disappointed parties, if they could be still used as witnesses to affect the import of the award, it will be observed that, after becoming *functi*, the ex-arbiters retain no trace of the conventional jurisdiction which the submission, during its subsistence, conferred upon them. They are, once more, mere third parties. But to allow them to put an authoritative interpretation upon a clause in an award, such as it would not otherwise have possessed from its own native force—or, in other words, to impart a legal force and effect to the clause which it had not before—would be to re-clothe the ex-arbiters with arbitral jurisdiction, which nothing but the consent of the parties could bestow. Being now *functi*, it would plainly be beyond their power to add an explanatory supplement in writing, to their delivered award, for the purpose of affecting and varying the legal interpretation of it; and, in principle, it seems equally incompetent to allow them to make a verbal supplement to it by their evidence as witnesses.[2]

478. A landlord and tenant entered into a submission, to determine what allowance should be made to the tenant, for manure which he had recently laid on the lands, and of which he had not got the benefit at his removal, which took place under a special stipulation, during the natural currency of the lease. In the submission, the tenant lodged a claim, which included, not merely the value of the manure, but also of certain alleged improvements, such as the straighting of ridges, summer-fallowing, etc., which were not within the submission. The arbiters awarded a sum "for meliorations made on the farm, *and* manure laid thereon." This was brought under reduction by the landlord, as *ultra vires*, in respect that nothing but the value

1829, 7 S. 616, appears to be an instance which illustrates an application of the first of these observations.

[1] See *infra*, B. VI. Chap. vii.

[2] It is quite consistent with this rule, that the notes made by an arbiter, pending the submission, and forming part of the actual procedure under it, should be considered by the Court as being sometimes a source of legitimate information, to aid them in construing an award; as, for instance, by showing the precise subjects which were under the arbiter's view in pronouncing his award. This was done in Bell, Dec. 8, 1825, 4 S. 289; and the Court became thereby satisfied, that a certain claim, subsequently insisted in by one of the parties, was not included in the interim-award, which alone had been pronounced when the submission fell. The Court held that, "although they could only look at the arbiter's notes, to ascertain whether he had decided the claim in question, they were entitled to look at them to that effect." See further, on this subject, *infra*, B. VI. Chap. vii.

of the recent manure was within the submission. The tenant alleged that the actual meaning of the arbiters, in using the words above quoted, was to allow only for such meliorations as had been caused by the manure; and he craved that the arbiters might be examined, in order to ascertain that this was the fact. The L. Ordinary, Craig, "before answer," ordained the arbiters to declare, in writing, whether they had used the words in question, in the sense alleged by the pursuer, or in the sense alleged by the defender. But the Court, on a reclaiming petition, found "that, in this case, it is not competent to examine the arbiters." The reporter (the late Professor Davidson) adds, that in this decision the Court did not proceed upon special circumstances, but "upon general grounds." [1]

479. But although it is incompetent, at least in the general case, to examine arbiters, in order to explain their delivered awards, yet, in construing an award, the Court will take every legitimate assistance which the recorded procedure under the submission, or the actual state of the surrounding circumstances, can supply.[2]

480. In the event of a question of construction arising in such circumstances, that the use and possession of the parties under the award would avail to interpret the ambiguous words and elucidate the import of the award, a proof of such use and possession would be allowed, just as in the case of any other ambiguous deed, in which the use and possession of the parties would afford a legitimate aid towards

[1] Woddrop, Feb. 4, 1794 (628).

In L. Pres. Campbell's collection of Session Papers in the Advocates' Library, his Lordship has written the following note upon this case: "Dangerous to allow such explanations. The words of the decreet-arbitral show that something was taken in which was not in the submission."

"Besides, if any extrinsic evidence is to be resorted to, the written proceedings before the arbiters are the most unexceptionable; and from these it is plain, that meliorations in general were claimed and allowed. It is equally plain, that a very false view of them was given.—See former Appendix, and the letter from Hamilton (one of the arbiters) to the oversman."

The petitioner's first petition has not been preserved, so that the contents of its Appendix are not now known. The letter from Hamilton is not among the printed papers, but is described as a statement of that arbiter's views of the case, and the reasons why he differed from the other arbiter (Bogle), who eventually concurred with the oversman in pronouncing the award under reduction.

[See also opinion of L. Neaves in Cameron *v.* Menzies, Jan. 25, 1868, 6 Macph. 279.]

When an arbiter made an *ex parte* explanation of his delivered award, on the application of one of the parties, the Court not only disregarded the explanation, in construing the import of the award, but held that the arbiter was disqualified from continuing to act. The reference did not fall, inasmuch as it formed part of an onerous agreement; but the parties named new referees, after the Court had intimated an opinion that the arbiter had disqualified himself.—Reid, Dec. 15, 1826, 5 S. 130.

See Dalgetie, Nov. 16, 1574 (12300).

[2] See further, on this subject, B. VI. Chap. vii.

its interpretation,[1] because it indicated their mutual understanding on the subject.

481. Or where an award in dealing with localities—such as boundaries, for example—makes use of descriptive terms which are alleged to be ambiguous, the Court, if necessary, will allow a proof of the actual state of the localities to which the terms apply. After having received the assistance which may thus be afforded, the Court will determine whether the language of the award admits of clear application to the localities, as they are found actually to exist.[2]

482. An award should be congruous, and consistent in its several parts. Where there is repugnancy and contrariety between the different findings of an award, it is difficult to say that each finding should not be of equal inherent force, as they all flow immediately from the same source—the arbiters themselves. The award is a *unum quid*, all of which is issued together. If the result be, that the award, as a whole, is inextricable, it will be set aside.[3] It may be, however, that the internal *repugnantia* affects, exclusively, some distinct and separate portion of the award only; in which case, if the arbiter had power to pronounce part-awards, the rest would seem to be valid, provided it appeared that the arbiter would have given the same decision as to the rest of his award, whichever way he might have decided the defective portion of it. To this extent, the analogy which saves the rest of an award, when a distinct and isolated portion of it is set aside as *ultra vires*, would seem to apply.

483. An award should be final and conclusive in its tenor, allowing no part of the subjects submitted to remain open, even contingently, for after question between the parties. Otherwise, it has failed in the essential particular, of being a definite decision.

484. An arbiter, especially where he has not received power to

[1] Cuninghame, Dec. 20, 1836, 15 S. 295.

[2] Lumsden, June 3, 1842, 4 D. 1353. Where an award for settling marches described one of the boundaries as consisting in part of "the burn of the Buck, by its principal stream to its source," a reduction was raised, on the ground that there were various sources of the burn, and so the award was void from ambiguity. The Court sustained the award, holding that there was no *ex facie* ambiguity in the award, and that, if it should become necessary, a proof could be led, to trace the line of the principal stream up to its own proper source. That principal stream, and its proper source, existed in nature, and admitted of being established by proof. "The arbiter has given the mark, and even though it should require a verdict to settle a dispute, which one of the parties may choose to raise about its identity, this is not a reason of reduction. Suppose the source of the stream had formed part of the boundary in the titles, would this have become inoperative, as a point denoting a line of march, because an application to the Sheriff, or some such proceeding, might be necessary, in order to refute the assertion made by a party, that what should be held the source was questionable?"—Per L. Cockburn, Ordinary, *ibid.*

[3] In England, "where the award is manifestly inconsistent and repugnant, the Court will set it aside."—Russ. 299, [4th ed., 285].

pronounce part-awards, should be careful how he admits reservations into his award. If the questions between the parties which are thus reserved, be not matters within the submission, and brought before him for judgment, the reservation may be harmless, because such questions would reserve themselves. But, if otherwise, the reservation would seem to be fatal, because the award would not then exhaust the submission.[1]

485. An award should, as far as possible, be simple and absolute in its terms, free of all hypothetical contingencies. It should state distinctly the respective rights and obligations of the parties, and it should decern and ordain implement, *hinc inde*, thus authoritatively and definitively settling the matters in dispute. Qualified, or conditional, or alternative findings, unless carefully preconsidered in all their bearings, are apt to let in a plea either of non-exhaustion of the submission, or of ambiguity, or of inconclusiveness of the award. An instance in which the House of Lords (differing from the Court of Session) held (by an apparently rigorous construction) that an error of this class had been committed, is noted below.[2]

486. An award must not reserve any arbitral power to be exercised by the arbiter after the close of the submission. It is incompetent to do so, as the arbiter is necessarily then *functus officio*, and can derive from the submission no more power or authority over the matters submitted, than any other stranger whatever. This is quite a different act from that of merely inserting in an award findings or decernitures which are to be operative and effectual after the submission shall have closed, and which can be enforced without again recurring to the arbiter himself. Every award must contain deliverances of the latter class; as, for instance, when one party is found liable in a certain sum to another, and is decerned by the award to pay it. The award then contains the order of an arbiter, which un-

[1] In a case where this objection was taken, it was repelled by the Court, on the ground stated by L. Pres. Hope, that "the referee's reservation applies only to matters not falling under the reference, and gives no ground for maintaining that his award does not exhaust the reference." The judgment was altered on appeal, but on a different ground. As to this point, the same opinion was expressed in the House of Lords as in the Court of Session.—Edin. Oil Gas Co., June 28, 1832, 10 S. 723; July 17, and Aug. 27, 1835, 2 S. & M'L. 270. See also Stewart, Feb. 23, 1709 (6836).

In Gray, Feb. 5, 1833, 11 S. 353, the reservation of a claim of damages, which was introduced into an interim award, gave rise eventually to an action at law, after the close of the submission. The final award had not expressly disposed of the above reserved claim; and, although the Court held that the award had, *de facto*, disposed of it, this result was only attained at the cost of defending against an action, which was raised for the purpose of enforcing the claim.—See also the special case of George, Feb. 4, 1836, 14 S. 404.

[2] Edin. Oil Gas Co., July 17, and Aug. 27, 1835, 2 S. & M'L. 243. See observations by L. Brougham. The decerniture against one party was made conditional on the performance of a voluntary act by the other.

doubtedly possesses force after the submission has closed, and indeed, in the case of a final award, only then comes into operation. But it so operates as being, in itself, the constitution of a valid legal obligation, which a Court of law will enforce; which is essentially different from operating through the medium of any new action on the part of the arbiter, exerted after the submission is closed.[1]

[1] An interesting example of enforcing conditional findings in an award, some time after the submission was finally closed, occurred in L. Duffus, Dec. 12, 1833, 12 S. 205. A tenant had made advances to his landlord. Questions of accounting between them were submitted to arbitration. The rent of the tenant's farm was an admitted deduction from the balance due by the landlord. The landlord alleged that a new lease had been granted, raising the rent from £70 to £100, during a period of ten years, but that this lease had fallen aside. The tenant being dead, his executor was the other party-submitter, and he denied the new lease. The award found £3367 due by the landlord, "subject, however, to deduction of such additional rent for the farm" as the landlord "may establish right to, by production of the alleged lease." The above sum was ordered to be paid in a series of annual instalments. Before these were all paid, the missing lease was found, and it established the increase of rent averred by the landlord. The landlord then produced the lease, and suspended a charge for one of the annual instalments; and the Court adjusted the balance remaining due by him, by allowing him the deduction which the award had specially provided for in that event, and also deciding as to the manner of computing that deduction.

In this case, it was not necessary to recur to the arbiter, after the close of the submission, for any fresh exercise of arbitral power. It was merely necessary to apply to a Court of law to enforce, as between the parties-submitters, their mutual rights and obligations, as the same had been definitively fixed by the award.

The questions which have been raised respecting the exercise of reserved arbitral power, appear to have been more numerous in England than in Scotland.

In England, "an arbiter cannot, in his award, either reserve to himself or delegate to another the power of performing in future any act of a judicial nature respecting the matters submitted. His duty is to make a final and complete determination respecting them by his award, and it is a breach of that duty to leave anything to be determined hereafter."—Russ. 277, [4th ed., 266]. But "an important distinction has been taken by the Court, that, though the arbiter cannot reserve a further judicial act to be done, he may reserve a further ministerial act to be done, either by himself or a stranger, at any time, even after the time limited for making the award has expired."—Russ. 280, [4th ed., 268].

Thus, in a submission for fixing the value of land, if the arbiter fixes the rate per acre, he "may direct the number of acres to be ascertained by measurement, for measuring is a merely ministerial act."—*Ibid.*, [4th ed., 269.—In Paul *v.* Henderson, March 15, 1867, 5 Macph. 613, the majority of the Court regarded the payment of a certain consigned sum of money as a merely ministerial act, while the minority held the award null, as it did not decide to whom the money was legally due.]

But where an award ordered a defendant to pay a certain sum to the plaintiff, with a proviso, "that, if it should afterwards appear to the arbitrators that the plaintiffs had not discharged the defendant from certain debts, in which he was bound for them, that so much of the sum should be repaid to him as to the arbitrators should seem due, the award was considered bad; for these words, 'if it should appear,' were construed to be a retention by the arbitrators to themselves of a discretionary power of judging hereafter."—*Ib.* 278, [4th ed., 266].

If, however, the reservation of such authority to decide, applies only to "matters

487. Where the arbiter sees fit to direct certain deeds to be executed by the parties, it seems to be desirable, wherever it can be done, that these should be executed before the award itself is delivered to the parties (or, at least, *unico contextu* with such delivery), so that the arbiter may be still clothed with his office and authority, while the deeds are being framed at his sight. It may sometimes, however, be impossible to accomplish this; because certain acts may require to be performed, or certain rights to be irrevocably established, before the deeds can be executed; and it may be that these things cannot take place until after a final award shall have been delivered to the parties, and the submission has been thereby closed. In such cases, the question occurs, How far it is competent for an arbiter to insert in his award the proviso, that the deeds shall still be prepared at his sight, and to his satisfaction; or whether this would not involve the reservation to himself of the posthumous exercise of arbitral power, after he had ceased to be arbiter? There is one case in which the L. President and L. Dun, as arbiters, ordained the parties to execute mutual discharges of all actions or claims competent to them, *hinc inde*. In a reduction, one of the reasons alleged was, that "the arbiters prorogate their own power after the submission was expired, by ordaining all writs, in implement or prosecution of the decreet, to be extended at their sight." The report bears, that the Court "repelled the reason founded on the prorogation," and sustained the award.[1] It might, accordingly, be expected that such a precedent would have much

not submitted," it will be merely held void in itself, without voiding the rest of the award, which is unaffected by it.—*Ib.* 278, [4th ed., 266].

"Arbitrators often direct the parties to execute bonds, releases, or other documents, to be settled by themselves or others. Such a discretion will sometimes avoid the award, sometimes not, according as, in each case, it is treated as a reservation of a judicial or a ministerial duty."—*Ib.* 281, [4th ed., 269].

"A reservation to the arbitrator is generally construed as judicial. Thus it has been held, that if arbitrators award that the defendant shall pay the plaintiff a sum certain, and, in security for the payment, shall execute such a bond as they shall advise, the award is invalid."—*Ib.* 282, [4th ed., 270].

Apparently where the award itself "determined the nature and character" of the deeds to be executed, and merely deputed "their formal drawing up" to be done at the sight of counsel, this was held a delegation of a ministerial act only, the function of counsel being merely ministerial, viz., to make the deeds (a bond and release) "as strong in law as he can."—*Ib.* 282, [4th ed., 270].

With respect to the cost of a cause, it would appear that, where a cause in one of the Superior Courts is referred, and the award directs one party to pay the whole, or any definite proportion (*ex. gr.*, $\frac{5}{8}$ths), of the costs, it is "sufficiently certain, though it does not ascertain the amount." By the practice of the Superior Courts, "the costs of such an award will be taxed, as a matter of course, by the officer of Court," "acting rather in a ministerial than a judicial capacity."—*Ib.* 287, [4th ed. 275].

A principle, apparently analogous to this, was applied in Scotland, in Paterson, May 15, 1829, 7 S. 616.

[1] Erskine, July 30, 1714 (649).

weight given to it in any case of similar circumstances. Yet it is material to observe, that Erskine considers that such a provision, introduced into an award, would just be an attempt to exercise proper arbitral power after the submission had come to an end, and would be invalid.[1] Until this point shall receive the judgment of the Court, therefore, it would seem prudent and advisable, with respect to any deeds which cannot be executed before the expiry of the submission, to describe their nature and tenor with precision in the award, and to impose an explicit obligation on the proper party to execute them. This being done, the obligation could be enforced in Court, after the close of the submission, without further recurring to the arbiter.

488. When a delivered award is found to contain within it any error or mistake, however palpable, it is very difficult to apply a remedy. This fact is strongly suggestive of the expediency of the arbiter's submitting a draft of a proposed award to the parties on both sides, before extending it. After all discussion on the merits has closed, it is still useful to resort to such a precaution as this, as a means of guarding against oversight or omission. And it will generally happen that one, at least, of the parties, being heartily desirous to protect the forthcoming award, will be able and willing to afford efficient assistance in scrutinising the draft, and inviting attention to any defect of this description.

489. An error of judgment, if it be found to exist in a delivered award, is of course beyond all cure, even though it originated in mere inadvertency.[2] Nothing but the consent of both parties can sanction the re-casting of an award, so as to rectify this. But it would appear that an obvious *clerical error* should admit of being rectified at the sight of the Court, just as much as an obvious *error calculi*.[3] The arbiter himself, after becoming *functus*, could have no better right to correct this error, than any other stranger would possess. But when

[1] 4 Ersk. 3. 32. See, however, 1 Bankt. 23. 23.

[2] [Welch *v.* Jackson, Dec. 23, 1864, 3 Macph. 303.]

[3] This would appear to have been the view of the Court in the following case. A submission stood prorogated to 1st October 1739. The arbiters devolved it on the oversman by minute, dated 5th September 1839. The oversman executed a further prorogation by minute, which bore to be dated 27th *October* 1739, and which prorogated the submission until 31st October 1739. He executed an award on 10th October 1739, which was registered on the following day, 11th October. In a reduction of the award, the pursuer pleaded that no prorogation had been made by the oversman until after 1st October, on which day the submission, therefore, fell; and the oversman was *functus officio* on 10th October, when he executed the award. The answer was held good, that it sufficiently appeared, *ex facie* of the proceedings, that the true date of the oversman's prorogation was 25th *September* 1739, though by a mere clerical error, the word *October* had been written in the minute of prorogation, in place of September. In the circumstances, the Court held that "there was sufficient evidence to prove that it (the minute of prorogation) was dated before the 1st of October 1739, to which day the submission was prorogated by the arbiters."—Macbryde, July 21, 1748 (657).

the award was produced in Court, as the foundation of an action there, the Court should no more be debarred by a clerical error from adopting the true reading of an award, than they would be debarred, by the same accident, from adopting the true reading of any other contract which was put in suit before them. There is nothing in the Act of Regulations 1695, and nothing in the contract of submission, more than in any other contract, to protect a clerical error from being rectified, or to cause the mere slip of a clerk's pen to invert the rights of the parties.[1] A Court of law would be a very defective organ in dispensing justice to the lieges, if it had not vigour enough to supply such a remedy as this.

490. A pure *error calculi*, occurring in an award, is as susceptible of correction by the Court as a pure *error calculi* occurring in any other deed. In fact, the rectification of such an error, like the rectification of a mere clerical error, is nothing else than the true and correct reading of the award itself. But if the mistake, which is termed an *error calculi*, be not a purely arithmetical error of calculation; if it rests upon an oversight of the arbiters, in overlooking some legal principle, for instance, while making a calculation, the error resolves into an error of judgment; and in a delivered award that error is beyond remedy by any Court. The fact that the error of judgment evolved itself in applying a false principle to an arithmetical computation, leaves it nothing else but an error of judgment still. But it is only a proper arithmetical error which falls under the head of *error calculi*.[2]

[1] In England, it would appear that a clerical error is not fatal to an award. Under a reference to ascertain a party's liability to discharge a sum due under a mortgage, "executed on or about the 29th *September* 1818," an award was made, which described the mortgage as dated "on or about the 29th of *December* 1818." The Court held, notwithstanding the clerical error of writing "December" for "September," that "the award substantially decided the question, as only one mortgage was mentioned."—Russ. 262, [4th ed. 252, where the above passage is omitted, but reference is made to the same case].

See rectification of a clerical error in an interlocutor, Kerr, Dec. 17, 1835, 14 S. 180. See also clerical error (of omission) as to the sum in a bill of exchange, held by the Court immaterial, even in a question as to diligence raised on the bill. Gordon, June 3, 1848, 10 D. 1129.

[2] In a reduction of an award which had been pronounced as to a claim for payment of certain mason-work, the Court repelled the reasons founded on corruption, etc.; "but as the pursuer alleges an error in the measure, which resolves into an *error calculi*, before further procedure remit to to visit the work in question, and to report to this Court the measurement thereof." On considering the report, the Court at first held that an *error calculi* had been committed, and they accordingly "gave a deduction from the sum in the decree-arbitral." But, on a reclaiming petition, they altered, and "found that there was no proper *error calculi*: that the arbiters had the mode and the extent of the measurement expressly under their consideration, and had determined upon it, therefore any error which could be charged against them, if there was any, was not an *error cal-*

491. An award should, as far as possible, be self-contained, making no reference to extrinsic documents which can be avoided. It is when thus self-contained, that an award will be found most unassailable. It may, no doubt, in many cases, be indispensable to refer to other documents, but this should be done as sparingly as may be. And it should be remembered, that it has been repeatedly observed on the bench, that a document may be so referred to, as to require that it be read as part of the award. Great circumspection, therefore, should be used, that nothing incongruous is thus imported into the body of the award.

culi, but iniquity; which was clearly incompetent."—Nasmyth, July 20, 1776, and Nov. 18, 1777, 5 Suppt. 427.

A remarkable illustration of the limits of rectification of an *error calculi* occurred in Morrison, April 26, 1825, 1 W. & S. 143.

Mutual claims were made on the insolvent estates of two joint-adventurers in respect of the sums received and disbursed by each on account of the adventure. These claims were submitted to arbiters, who issued notes, stating that the adventure had resulted in—

"Total loss, ...	£407	8	8
Half to each partner, . . .	203	14	4."

Their notes also set forth, that, on a calculation of the receipts and disbursements of each, for the joint-adventure, Robertson, one of the adventurers, had advanced £409, 0s. 7d. more than Turnbull, the other.

The arbiters afterwards issued an award, purporting that, "having made up an account of the receipts and expenditure respecting the said joint-adventure, we find that the said W. Robertson has advanced, in the payment of the debts of said adventure the sum of £409, 0s. 7d. more than the said George Turnbull or his trustees; and therefore we find him entitled to rank for that sum as a common creditor on the funds of the said G. Turnbull." The award decerned Turnbull's trustees to pay Robertson "£168, 14s. 9d., being the amount of the dividend to which we think him entitled." This latter sum was a correct calculation of the dividend justly due upon a ranking to the amount of £409, 0s. 7d.

Turnbull's trustees brought the award under reduction, *inter alia*, because, on the arbiter's own assumption, that Robertson was in superadvance for the joint-adventure to the extent of £409, still one-half of that was his own proper disbursement as one of the joint-adventurers, and it was only on the other half that he could be ranked as a creditor on his (Turnbull's) estate. The trustees, therefore, pleaded "that, on the principles assumed by the arbiters, they had brought out too large a sum, which, being equivalent to an *error calculi*, the decree was liable to be set aside." Robertson admitted, "that if there be an error in arithmetic, it may be corrected at any time; but the error must be in arithmetic, and not an error in point of principle."

The Court sustained the award, L. Robertson observing, "that there was no proper *error calculi*, which must be an error in arithmetic, and not resolvable into an error in point of principle, but that here the arithmetical calculation was perfectly correct."

On appeal, the interlocutor was affirmed, but without costs. L. Gifford observed: "It does not appear to me that the mistake which the arbiters committed is one which ranks with what are denominated errors of calculation; but that, if there be an error, it is that which has arisen in their minds on the application of the law to the principles on which they have decided." This his Lordship held to be mere error of judgment, and, accordingly, no ground for impeaching an arbiter's award.

492. It seems to be scarcely ever beneficial to refer, *in gremio* of an award, to the tenor of the notes which the arbiter may have issued in the preparatory stages of the submission, as containing the reasons or views on which his award is based. In the course of a protracted submission, all these notes may not be homogeneous, and frequently they are not framed with the same strict accuracy and precision of expression, which is necessarily employed in framing the tenor of the award itself. Indeed, the notes are often, in part, composed of mere tentative views, stated in order to be discussed by the parties in the preparatory stages of the submission; and they may be more or less departed from by the arbiter, when finally making up his opinion. It can rarely, therefore, be beneficial, and must often be hazardous, to place the award, in any degree, upon the notes, as its foundation. The award itself may, in general, be regarded as a more perfectly constructed instrument the more nearly it approaches to a mere skeleton deliverance, consisting of distinct findings and decernitures, which simply and absolutely determine, without reference to extrinsic writings of any kind, the respective rights and interests of the parties.[1]

493. For the reasons just stated, it is inexpedient to state any process of reasoning, or *rationes decidendi*, in an award. All the argumentative process, whether by the parties, or by the arbiter when revolving the subject in his own mind, is essentially of a merely preparatory character, and should be excluded from the consummated result, viz., the award. The ratiocination is but the means, more or less perfect, according to circumstances, by which the end—viz., the actual sentence—is to be reached. When the arbiter has resolved in his own mind what the rights and obligations of the parties respectively are, it is the purpose of the award to embody that result in the simplest and clearest form, apart from all superfluous matter—apart even from the preparatory *rationes decidendi*. And, as it is a source of hazard to the award, where this rule is unnecessarily departed from, it appears to be the arbiter's duty to attend to it.

494. Questions of some nicety have repeatedly arisen, as to what constitutes *delivery* of an award. This is a point of much moment, because an award is subject to recall or alteration by the arbiters, so

[1] These observations apply to the more formal style of award under a regular submission. It is unnecessary to remark, that in a large class of cases a clear statement of the arbiter's decision, however brief, is all that can be required, and specific findings would be worse than superfluous.

Russell, in his "Theory of Conveyancing," p. 119, suggests the expediency of destroying all minutes of procedure and proof taken in a submission, as soon as a final award is signed, because the preservation of these only tends to breed future litigation. Without adopting this view, the fact that so eminent a practitioner has expressed it, seems to be strongly corroborative of the expediency of rendering every award, *ex facie*, self-contained.

long as the submission subsists, if it has neither been delivered nor put on record. It is clear, however, that the mere delivery of the signed award to the clerk of the submission has not necessarily, or always, the effect of rendering it a delivered instrument in the sense now under consideration, because "the clerk is the servant of the arbiters, and his possession is their possession." This rule has been strongly established by decisions both of the Court of Session and of the House of Lords.[1]

495. In connection with this subject, it is proper to have in view the case of Simpson in 1736, in which an arbiter, near the expiry of the submission, executed an award, which remained unrecorded, and in the clerk's hands, when the term of the submission came to an end. One of the parties raised a reduction of the award, contending that it possessed no legal validity, as it was never recorded nor delivered by the arbiter. The Court, however, repelled the reasons of reduction.[2]

[1] "Arbiters may draw up and sign twenty decrees-arbitral, and successively cancel every one of them. An arbiter does nothing effectual till he either delivers or registers his decreet."—Per L. Braxfield, in Robertson, June 20, 1783 (653), and Hailes' Dec. 912. See also Gray, May 31, 1827, 5 S. 686; and July 8, 1831, 5 W. & S. 305. See *supra*, B. III. Chap. ix.

[2] Simpson, Dec. 10, 1736 (17007), and Elch. Arbn. 2.

It does not appear that there is any *repugnantia* between this case and the later cases of Robertson and Gray, *supra*, sec. 494, note. When the arbiter, in Simpson's case, executed a completed award, every presumption was in favour of his having, at the time, the full intention of thereby performing his own duty as arbiter, and executing an effective instrument. It depended entirely on his own will, whether it should become irrevocable, and he might part with the power of revocation in various ways. He might certainly do so by delivering the award to the party, or by putting it on record. And the Court held that he might equally do so, by deliberately allowing the submission to expire, after which all his powers as arbiter (including this power of revocation) were at an end; while he left the award in the clerk's hands, extant, unrecalled, as a completed and finished deed. This case seems to be, in substance, quite distinguishable from that of Gray, in which the arbiters, *rebus ipsis et factis*, refused to authorise delivery of the award; and did so while yet arbiters, and possessing full power to revoke it.

This interesting point is incidentally considered by L. Cowan, Ordinary, in the note to his interlocutor in E. of Hopetoun, Mar. 6, 1856, 18 D. 746. "The principle must be admitted, that the arbiter, during the subsistence of his powers, may recall any award or decree he may have executed and placed in the hands of the clerk, while it is neither delivered nor put on record. The question, however, assumes quite a different aspect, when, at the termination of the time limited for the endurance of the arbiter's powers, a decree-arbitral, duly executed, is found in the hands of the clerk of the submission, or is in course of being placed in his hands. In that state of matters, it is considered that the arbiter has no longer any control over the deed; that the decree must be viewed as placed in the custody of the clerk for behoof of the parties interested; and that a valid decree-arbitral has been pronounced, although actual delivery of it to the parties, or its registration, may not take place till after the expiry of the time limited for the endurance of the submission."

Apparently, in England, an award is held to be "published" when it is fully

496. If an award, duly executed, has been put by the arbiters *in cursu* of transmission, for the purpose of being delivered to the parties, it is held to be a final and complete award, as to all concerned; although the term of the submission should expire before the actual delivery of the *corpus* of the award to the parties, or even to the clerk, was effected.[1]

497. It would appear, therefore, that the principal requisites to the validity of an award are,—that it should be a delivered instrument; in the form of a probative writ, unless when holograph by a single arbiter; embodying the arbiter's own proper judgment; commensurate with the submission, so as to determine everything within the submission, and nothing beyond; unambiguous in its language; congruous and self-consistent in its several members; self-contained, and neither resting upon notes or any other extrinsic document, if it can be avoided; decisive in its findings and decernitures; constituting whatever obligations it means to impose, in such terms that, after the close of the submission, these may be enforced, when necessary, by Courts of law, without again recurring to the arbiter; simple, and, as far as possible, free from reservations or qualifications, which are apt to impair that essential attribute, the conclusive finality of the sentence.[2] In the

completed; but if any specific publication be enjoined by the submission itself, it must be complied with.—Russ. 243, 244, [4th ed., 234, 235].

In one case, where an arbiter executed his award before witnesses, and read it over, it happened that one of the parties died next morning. At a later hour of the same day, the arbiter sent notice to the attorney of that party, that he (arbiter) was about to declare his award, and requested the attorney's attendance that evening. It was held that the award had been "made and published" in the lifetime of the party.—Russ. *ibid.*, [4th ed., 235].

[1] M'Quaker, Mar. 19, 1859, 21 D. 794. See *supra*, B. III. Chap. ix.

[2] In connection with this subject, a point may be noticed of a somewhat unusual character, respecting the validity of awards, which was raised in E. of Hopetoun, Mar. 6, 1856, 18 D. 743. An opinion upon it was expressed by the L. Ordinary, Cowan, in the note to his interlocutor, but it has not yet been made the subject of a judgment by the Court.

An oversman pronounced two awards in the same submission; one on the 27th, and the other on the 30th January. "In all substantial respects, these deeds were the same; and the second was admittedly executed with the view of obviating certain formal objections, to which the first was thought to be exposed."

A reduction was raised of both awards, (*inter alia*) as being improbative, and also as not having been delivered before the expiry of the submission. While disposing of part of the case, the L. Ordinary observed, in his note: "It does not, in his opinion, admit of dispute, that the validity of either the one or the other of the decrees will afford a sufficient answer to the grounds of reduction."

"Assuming the first deed to be free of objection, as regards formality in its execution, and not to be open to exception on the ground of not having been duly delivered, it is vain to say that the attempted execution of a second deed, rendered inept the previously well-executed and formal decree. Had the new instrument been perfectly formal, and embodied findings different from those contained in the other, it would have been for inquiry, whether, on the facts as ultimately ascertained, the arbiter's powers were not exhausted by the execution of the

case of an oversman's award, it must also specially narrate that the arbiters had differed in opinion.

498. It appears in early times to have been made a question, whether an award was binding on the heirs and successors of the parties, unless it had been specially stipulated in the contract of submission that the award should so be binding. It was decided, however, even then,[1] and has long been recognised as indisputable, that the completed and delivered award of an arbiter, being just the consummating part of an onerous and lawful contract, is as binding upon the heirs and successors of the contracting party as any other lawful and onerous contract into which he had entered. The nullifying effect of the death of a party, during the currency of a subsisting submission, which, of course, liberates his heirs from the submission, rests upon grounds which have no application whatever to an award which has been completed and delivered previous to the party's death.

As a delivered award constitutes a complete personal obligation against a party-submitter, it was held in an old case, "that a decreet-arbitral ordaining to discharge, is equivalent to a discharge."[2]

499. Before leaving this subject, a few observations may be made respecting Interim-awards, and Part-awards, or Partial awards. These terms are frequently used as equivalent expressions; but it has been suggested[3] that there is a certain distinction between them, which parties-submitters are sometimes desirous to recognise in preparing the terms of their submission.

first decree: for it might have appeared, as the result of investigation, that in this peculiar case, there had been such delivery of the first deed for behoof of the parties, as to have excluded the application of the principle recognised in the case of Ramsay, 1782-3 (653), and similar cases. But when the admitted fact is, that the second decree embodies the same findings as to the rights of parties with the first, and when, moreover, the second decree is itself alleged to be void, it seems very clear that the validity of the decree, first formally executed, cannot be in any respect impaired by the attempted execution of another deed, for the useless purpose of giving effect to views already declared by the arbiter in a due and formal manner."

"On the assumption, again, that the second deed shall be found to be in all respects a formal and valid instrument, and not liable to be objected to, as not duly pronounced, the fact of a prior decree to the same effect having been executed, or rather attempted to be executed, must be unavailing, as an objection to the effectiveness of the formal decree, pronounced *ob majorem cautelam*, in order to obviate possible objections to the first. Clear it is, that there can be no interest to object to the second instrument, except on the ground of the first being invalid and objectionable. But, in this view, it was certainly within the powers of the arbiter, to execute a valid and formal decree-arbitral, so as to give effect to his views; assuming always, that this was done by him effectively while the time limited for his decision was still unexpired."

[1] Laird of Lochinvar, 1583, Spottis. Pr. Arbn. 14.

[2] L. Elphinston, Dec. 10, 1623 (16472).

[3] Parker.

500. This does not prevent the requisites of a part-award and an interim-award from being the same,[1] in point of both form and substance, as those of a final award: with the exception, of course, that they do not require to be exhaustive of the subject-matters submitted; that they purport to be of a more limited character; and that they are also designed, *in gremio*, by their distinctive character as interim-awards, or part-awards, respectively.

501. But the essential peculiarity of a proper interim-award, as distinguished from a proper part-award, in the sense above indicated, is, that the interim-award is of a temporary and tentative character only; and although delivered, it is inherently subject to recall or alteration by the final award.[2]

502. On the other hand, the distinctive characteristic of the proper part-award, or partial-award, when not also designated an interim-award, is said to be that the part-award becomes final, so far as it goes, as soon as it is delivered to the parties. It decides that part of the submission which it includes, as irrevocably as the final award decides all the rest. But apparently the familiar term "interim-award" is so commonly used as including all part-awards, of every class, which are pronounced during the currency of a submission, that the above distinction, even if critically well founded in itself, may be practically disregarded. The question, whether or not an award is revocable which disposes of part only of the subjects submitted, and which has been delivered pending the submission, will apparently depend, not on the mere circumstance of the word "interim" having been used to designate the award; that term being often applied to part-awards,

[1] See Styles in Appendix.

[2] Edinr. and Glasg. Ry. Co., Jan. 28, 1840, 2 D. 486. In a submission of a claim of compensation and damages between a Railway Company and a proprietor of land, the arbiter, after some very summary procedure, pronounced an interim-award for £1750, as a payment to account of the proprietor's claims. The Company was required to pay the sum immediately, as a condition of obtaining possession of the ground; but they, at the same time, brought a reduction of the interim-award, chiefly alleging that the sum awarded was so extravagantly great as to infer corruption against the arbiter. The Court did not feel warranted to infer corruption, and, therefore, refused to sustain the reasons of reduction; but being apprehensive that the sum, on fuller investigation by the arbiter, would be found to be exorbitant, their Lordships thought it right to qualify their interlocutor, so as to recognise, in the fullest manner, the arbiter's power of altering the interim-award, if he should see cause to do so in his final award. The following clause was accordingly introduced into the interlocutor of the Court: "In respect that the sum awarded in the interim-decreet has been paid, but may be found ultimately to exceed the sum awarded in the final decree, supersede further consideration of the case, till the arbiter shall have investigated the facts, and is prepared finally to fix the amount of the damages." L. Pres. Hope observed: "I think we should insert some qualification in our interlocutor, so as to prevent the possibility of the interim-decree being held to be conclusive, if, after full proof, the arbiter should become satisfied that it awarded a larger sum than the final decree should contain." The other Judges concurred.

which are final as far as they go; but upon a consideration of the tenor of the particular "interim-award" itself, and of the terms of the particular submission under which it has been pronounced.

503. In the hands of a careful arbiter, it will rarely happen that an interim-award of payment shall be found, at the close of a submission, to have been excessive. Sometimes, however, it may be beneficial to both parties, and the submission may have contemplated, that a fixed interim regulation should be made at an early stage of procedure, for the purpose of immediately terminating certain current disputes, without either party having any reason to expect more from the arrangement than a temporary rule, which will probably be more or less altered in the end. In Courts of law, the example of an interim scheme of locality affords a familiar instance of the adoption of a tentative rule, for the immediate temporary convenience of all concerned, while it is perfectly understood that there will probably be material modifications of that interim rule, when a final decree comes to be pronounced. And a large class of interim interdicts would equally illustrate the same practice. In analogous cases, therefore, an arbiter, duly empowered, may be called upon, in the exercise of a sound discretion, to pronounce an interim-award on matters in dispute, at an early stage of the submission, even although, from the imperfect state of his information, it may be impossible to rely with any confidence that such award may not eventually require to be materially altered. But, generally speaking, it is very undesirable to exercise arbitral authority in pronouncing an interim-award, unless there are reasonable grounds to satisfy the arbiter that, so far as he goes, he is proceeding in a right direction, and can never be required to retrace his steps. This is particularly true in regard to questions of accounting. Indeed, it is difficult to see that an arbiter can be exercising a sound discretion, if he gives an interim-award against a party for payment of a sum, the whole of which he does not see will be, at least, and in all events, ultimately found due. He may otherwise occasion excessive hardship, under circumstances which seem seldom to admit of justification. And in every question of making an interim-award, it will be material for the arbiter's consideration and guidance, whether the consequences would be most injurious which would result from its ultimately appearing that he had committed an error in making the interim-award, or an error in refusing it.

504. Although the interim-award be to remain simply unchanged in all its parts by the final award, it still seems proper, in the final award, to refer specially to it, and to hold it repeated, or otherwise to affirm and adhere to it. This may not be necessary, as the close of the submission, without any alteration being made on the interim-award, places it, *ipso facto*, in a position where it is unalterable, and therefore final. Nevertheless, it seems more regular to affirm it in the final

award, as this shows that the whole subjects submitted, were under the arbiter's immediate view in pronouncing his conclusive judgment.

505. Where the interim-award is to be recalled and altered, in whole or in part, this must, of course, be done by express deliverance in the final award. And care must be taken that no ambiguity shall exist either as to what is recalled, or as to what is affirmed, of the interim-award; and, further, that no *repugnantia* exists between the remaining portions of the interim-award and the deliverances contained in the final award. But this is a matter which does not appear to admit of any fixed regulation; it must depend, in each particular case, on the accuracy and discretion of the arbiter himself.

506. An award which is not meant to be final, should always be described, *in gremio*, by that distinctive designation which properly belongs to it; it might otherwise happen that the delivery of such an award might give rise to a plea that the submission was thereby closed. But there are some cases in which the limited character of the award is clearly established, by necessary implication, independently of its being so designated. An instance of this occurred under a submission-clause, which was ancillary to a contract of lease of coal, whereby all disputes "during the currency of the lease, or after the expiry thereof," were to be submitted to an arbiter, "from time to time, as the same shall arise." The tenant claimed damages from the landlord for an alleged breach of obligation in delaying to open a new coal-pit. An award was pronounced, finding £120 of damages due up to 15th September 1845. Notes were previously issued by the arbiter, stating that he held such damages to be due, "reserving to the tenant any claim he may have for damages after the above date" of 15th September 1845. The tenant having afterwards claimed further damages, as accruing under the lease still current, the landlord objected that the arbiter's power to award damages was exhausted by the award already pronounced, which did not bear to be an "interim-award." A note of suspension and interdict was accordingly presented by the landlord, which the Court refused. L. Mackenzie observed: "The former decree-arbitral was a mere interim-decree for the damages accruing up to that time. It was necessarily an interim-decree; for as the submission embraces all the disputes between the parties which may occur during the currency of the lease, it is not in the power of the arbiter to pronounce a final decree till the lease expires."[1]

507. Even when an interim-award has been pronounced which is revocable by the arbiter, it becomes, in the ordinary case, unalterable, by the close of the submission, though without a final award. Nothing could recall or alter the interim-award, except a subsequent award by the arbiter in the same submission. Where that becomes impossible,

[1] Montgomerie, Dec. 8, 1849, 12 D. 274.

because of the expiry of the submission, the interim-award appears, of necessity, to become unalterable, and, in that sense, final.[1]

508. There is one case, however, in which an interim-award will not become final, even although the submission should expire without its being altered or recalled. This occurs where the interim-award does not contain independent findings of its own, but, on the contrary, embodies a condition which can only be purified by the subsequent giving forth of a final award. Where this is the case, the want of a final award must be fatal to the operative validity of the interim-award.[2]

[1] In Mackessock, Nov. 14, 1822, 2 S. 11, both an interim-award, and afterwards a final award, were pronounced; but the latter, only after the expiry of the submission. A reduction was brought of both awards. The Court reduced the final award, but sustained the interim-award, as valid and unobjectionable; the arbiter being empowered to pronounce interim-awards. In the previous case of Taylor, Jan. 19, 1822, 1 S. 240, the Court had occasion to express an opinion in favour of the validity of an interim-award, which was pronounced under powers to that effect in a submission, which expired without a final award; but no decision on the point was necessary.

[2] Wilson, Feb. 1, 1833, 11 S. 345. See, in particular, the note of L. Mackenzie, Ordinary.

BOOK V.

THE JUDICIAL REFERENCE.

---

509. It often becomes apparent, during the progress of an action, that it is more fitted for the tribunal of an arbiter than of a Court of law. In such cases, the parties, either of their own motion or at the suggestion of the Court, are in the practice of entering into the contract of Judicial Reference, whereby they agree to submit the decision of the matters in dispute, in the depending action, to a Referee or Arbiter, selected by themselves and approved by the Court. This may take place at any stage of the procedure, so long as there is an action depending in Court.[1] It has not unfrequently been resorted to, on the eve of a jury trial, or during the progress of a trial. It may equally be resorted to, before any record is made up in the cause; as the provision of the statute, 6 Geo. IV. c. 120, sec. 4, which requires a record to be closed before the Court gives judgment on the merits, does not apply to the interposition of the authority of the Court to the award of a judicial referee.

510. In its most important legal attributes, the contract of judicial reference is the same, substantially, with the ordinary contract of submission. The procedure, including the signed minute of judicial consent to the reference, is held to be a "subscribed submission," within the protection of the Act of Regulations 1695; and the award of the referee is exempt from alteration, on the merits, by any Court of law. It is thus exempt, alike on all matters of law, and on all matters of fact, which fall within the reference.[2]

[1] Shand, 409; Darling, 258; Parker, 201. See incidental notice of procedure resembling a judicial reference, of as early a date as 1614.—Balhagartis, Dec. 17, 1614 (644).

[2] "I am perfectly sensible that there is a difference between a judicial reference and an ordinary private arbitration. But is it not still a contract? And what is the contract? Instead of taking the chance of the ordinary procedure of the Court, the parties agree that the whole cause shall be determined by the judgment of a referee approved of by the Court. Is it not a bargain—a transaction—a binding contract to that effect? What is it but a submission, taking effect by contract in that particular form? The depending summons, and the minute of judicial consent or request, with the sanction of the Court interposed, constitute the written submission to which the statute of Regulations refers. The particular form, perhaps then unknown, signifies nothing. The substance of the thing, with

511. "When an award in a judicial reference is clear in its terms, correct in its form, embracing nothing which was not referred, and exhausting all that was referred, it is not competent for the Court to review such award on its general merits, or to set it aside, or to refuse effect to it, upon any idea of mere error in judgment, in the matters properly within the cognisance of the referee."[1]

sufficient form, is quite clearly a submission, within the contemplation of the statute; and that of the most authoritative nature, according to its principle; the contract being entered into, solemnly, in the face of the Court, and ratified by the express order of the Court. The submission being of the depending process, and emanating from the Court, the award must come back there, for the formal judgment on the summons, and warrant for execution. But still, the contract of submission is complete, and the Court can have no power to infringe the contract. The powers of the Court, as to any matter of judgment on the merits of the cause, have been entirely transferred by the parties, with the sanction of the Court, to another tribunal of their own selection; and all that the Court have to do, is to see that due execution of that contract shall be given. It is impossible that, consistently with this principle, the Court can inquire into the grounds of the referee's judgment, either in law or in fact, when there is a general reference of the cause. That would just be to break up the contract, and take the arbiter's duty, who had been chosen by the parties for their judge, upon ourselves. And, therefore, I cannot give any weight to the general reasoning here employed, as to the supposed distinction, generally, between a judicial reference and an extra-judicial arbitration. Both are submissions, making contract for judgment; and surely the judicial contract is the more sacred of the two."—Per L. Moncreiff, in Brakenrig, Dec. 17, 1841, 4 D. 274.

The other Judges delivered opinions to the same effect; L. J. Clerk Hope observing: "I must regard an award in a judicial reference in the same light as a decreet-arbitral." See also Campbell, Feb. 9, 1843, 5 D. 541.

[1] Per L. Moncreiff, in Mackenzie, Dec. 19, 1840, 3 D. 318, affd. Mar. 9, 1843, 2 Bell's App. 43. His Lordship further observed, that, "when the compact (of judicial reference) is once gone into, and the award returned, it is a final judgment on the matter submitted, requiring only the form of a decree to be interponed. If any different idea be [1] anywhere entertained (though I cannot but think

[1] L. Moncreiff apparently alluded here to the report of L. Brougham's opinion in Baillie, Aug. 27, 1835, 2 S. & M'L. 269; and especially to that part of L. Brougham's observations, on p. 271, which commences with the words, "It is upon an error in law that I hold this part of the finding to be erroneous," etc. From this passage of the report, it had been argued in the case of Mackenzie, that L. Brougham was of opinion, that the award of a judicial referee might be reviewed and altered for errors in point of law. When the case of Mackenzie went to appeal, his Lordship took occasion to explain that he had never sanctioned such a doctrine; and he further observed: "I can see no difference between an award and a decree-arbitral; that is to say, between that which takes place upon a voluntary or extra-judicial submission, and that which takes place upon a judicial reference." "I cannot draw any distinction between an award and a decree-arbitral; they are convertible terms." His Lordship further remarked, that "the laws of England and Scotland may be said to have diverged," on the subject of arbitration, almost ever since the date of the Act of Regulations 1695. "In Scotland, with respect to what they call a voluntary submission, or an extra-judicial submission, they have taken a view most clearly different from the view taken by the English Courts. And why, I may ask, should they not have had the same difference in their view of a judicial submission? I see no reason for supposing that they should not."

L. Cottenham.—"I am entirely of the same opinion."

L. Campbell.—"Neither the Court of Session, nor this House, can look to see whether the arbitrator came to a right conclusion in point of law, as both the law and the fact are

512. The contract of judicial reference is entered into, by the parties executing and lodging in process a minute of reference, signed by themselves or their counsel, to which, on their application, the authority of the Court is interponed, if their Lordships see no cause to withhold their sanction. The minute does not require any particular style, and is a document of the briefest and simplest form.[1] It is, in reality, a step of procedure in the depending action; and it is enough, if it sets forth, that the parties refer the process to the determination of an individual (named and designed), as judicial referee. It appears to be not uncommon to add the words, "with all the usual powers belonging to that office;" but that would be implied, though not expressed.[2]

513. As a minute of judicial reference is just a step in a process in Court, it does not require, in point of validity, to be either stamped or tested. It is enough that it be signed by the parties themselves, or by their respective counsel. Since the statute 5 Geo. IV. c. 41, which freed forensic procedure from liability to stamps, the proceedings under a judicial reference are equally free from stamp-duty, with the other procedure, in the same process, or with the procedure in any other process.

514. An advocate does not require an express mandate from his client, authorising him to enter into a judicial reference. The power to do so is implied in his office.[3] But a law-agent cannot refer an action, without express authority from his client. If he does so, and

there is a mistake in that supposition), as if the Court were still to review the award by considering its general merits, in law or in fact, I can only say, that I have never understood that that could be done, consistently with the law of Scotland, or the practice of this Court."

The other Judges concurred; L. J. Clerk Boyle observing: "We are bound to give the award the same deference as we would to a decree-arbitral." L. Medwyn—"I have always been taught that it (the award) has the same privileges, as to its freedom from challenge, that a decree-arbitral has."

[1] See Appendix.

[2] See *supra*, B. III. Chap. ii. as to the implied powers of an arbiter; the same belong to a referee.

[3] See *supra*, B. II. Chap. i. sec. 211 *et seq.*

---

referred to him by the parties; and if he has acted within his jurisdiction, and has exhausted all that was submitted to him, and has not been guilty of any misconduct, the award that he has pronounced is binding, both in point of law and in point of fact, by the Act of Sederunt (Regulations) referred to, which clearly has the force of an Act of Parliament."

Remarking on the "Report" to the Court, by the judicial referee, following on the "contract, which amounts to a submission—a contract subscribed by the counsel on both sides," his Lordship asked, "Is not that a decree-arbitral?" adding, that he considered such a contract to be a "submission within the meaning of the Act of Sederunt (Regulations)." He further observed: "The practice in Scotland, of considering an award or a decreet-arbitral, as conclusive, both as to law and fact, seems to me to be much more reasonable" than the practice in England; and his Lordship intimated that he would support it.

It seems unnecessary, now, to remark on the observation of L. Gillies, in the earlier case of Watmore, Dec. 2, 1841, 4 D. 150; especially as L. Mackenzie and the other Judges dissented from it at the time, and held that "a judicial reference is an arbitration."

if the client disclaims the reference, the agent will have subjected himself in personal responsibility to the other party with whom he agreed to make the reference.[1]

515. The minute of reference may agree to refer to one person as sole referee,—or to two persons, and, in the event of their differing in opinion, to an oversman, either named in the minute, or to be named by the two referees, as the case may be. The parties may regulate this matter at their own pleasure; subject always to their adopting such a style of reference as shall receive the sanction of the Court. If the minute has named two referees, without providing for the nomination of an oversman in the event of the referees differing in opinion, the reference will become abortive on the occurrence of that event, unless the parties shall then jointly agree to apply the requisite remedy.[2] This they may do, either by making a new minute of reference, with the sanction of the Court, to an oversman, or to other referees, with power to name an oversman: or, as occasionally takes place, to the former referees, with the addition of a third referee, and with power to the majority to decide.[3]

516. Where no special restriction is imposed on the referee by the minute of reference, and the whole action has been referred, he has power to dispose of the expenses, both of the action prior to the reference, and also of the reference itself.[4]

517. After the minute of reference is produced in process, the Judge in the cause is moved to interpone his authority to the Minute, and to make a remit to the referee. If no sufficient objection be stated to this motion, and if nothing, *ex facie* of the procedure, suggests a difficulty to the mind of the Judge,[5] an interlocutor is pro-

[1] Livingston, Feb. 23, 1830, 8 S. 594.

[2] Where a similar difficulty occurs in an ancillary submission-clause, which is specifically requisite for the extrication of a primary contract, the Court have indicated that they may possess certain remedial powers of interposition (*supra*, p. 186, note 1). But in the case of a judicial reference, no such necessity exists, to call for the like intervention; as the failure of the reference would just leave the parties with their process pending in Court, to be there prosecuted to a conclusion.

[3] It is believed that the nomination of an oversman is the course which is usually followed; although the nomination of a third referee is also occasionally resorted to, as in Potter, Nov. 17, 1847, 10 D. 98. This latter procedure, however, is open to the objection, that, in many disputed matters, no pair of the three referees will be found to agree with each other; and the attempt, in that event, to strike a supposed average result, by halving differences of opinion, may be questionable in itself, besides being obviously liable to gross miscarriage.

[4] Colquhoun, Jan. 13, 1825, 3 S. 298; Smith, June 15, 1830, 8 S. 920; Berry, Dec. 15, 1827, 6 S. 256; Jan. 26, 1831, 9 S. 337; Fairley, Feb. 11, 1836, 14 S. 470; Robertson, Dec. 6, 1836, 15 S. 199; Ferrier, Jan. 28, 1843, 5 D. 456; April 18, 1845, 4 Bell's App. 161. [Paul *v.* Henderson, March 15, 1867, 5 Macph. 613; Hilton *v.* Walker, July 2, 1867, 5 Macph. 969.]

[5] Were such a motion made, in a declarator of marriage or legitimacy, for instance, it would be *pars judicis* to refuse it.

nounced, by which the Judge "interpones his authority to the foregoing minute of reference; and remits to (A. B.) as judicial referee." It is not uncommon to include in the deliverance a warrant for diligence against witnesses and havers, and commission to the referee to examine them. The referee is often directed, in the remit, to report his opinion to the Court *quam primum.*[1]

518. As the act of executing a minute of reference implies a joint proceeding, by consent of both parties, it is very seldom indeed that any objection is stated to the motion for interponing the authority of the Court to the reference. But it is competent[2] to do so; and there is one recent case, in which, after a party had signed a probative minute, agreeing to a judicial reference, and in words, *de presenti*, referring a cause, he soon afterwards changed his views as to the expediency of following out that course; and, accordingly, when the minute was lodged in process, he appeared and opposed the motion by the other party, to have the authority of the Court interponed in common form. The Court thereon, "in respect of the *locus penitentiæ*," refused the motion.[3]

519. After the authority of the Court has been interponed to the minute of reference, it becomes as irrevocable at the mere pleasure of either party singly, without the consent of the other, as the ordinary contract of arbitration is.

520. Neither is it in the power of the Court, without the consent of both parties, to recall the remit to the referee, on the mere ground of its appearing to them an expedient course of proceeding to put an end to the reference, and to reinstate the Court in its full original

[1] Shand, 409.

[2] "The Court is not blindly to add its authority to the act of either parties or referee, if good and legal grounds can be shown why the Court should not interpone its authority."—Per L. Medwyn, in Brakenrig, Dec. 17, 1841, 4 D. 280.

[3] The minute set forth, that the parties "hereby refer" the questions between them to the referee; and that the Court was craved to interpone its authority. It was a probative writ. One of the parties was trustee on a sequestrated estate; and, as he had not obtained the concurrence of the Commissioners on the estate (required by the Bankrupt Act), and was advised that he might incur heavy personal responsibility by proceeding without that concurrence, he stated this to the Court, and was found entitled still to resile.—Reid, June 26, 1841, 3 D. 1102; and Session Papers in Advocates' Library.

[4] Even in the case of an ordinary remit by the Court to a man of skill, to report upon some point in the cause, if the remit be made upon the joint consent of the parties, neither party can afterwards resile, or refuse to be bound by the report. "In Scotland, as in England, I apprehend, that where parties consent that a thing shall be done on the judgment of a particular individual, he must be bound by that consent; and therefore it appears to me that Mr. Dixon, the appellant, must be bound by the judgment of Mr. Telford."—Per L. Gifford (affirming) in Dixon, June 29, 1825, 1 W. & S. 655. See the important effect allowed to a consent which has once been given by parties to a remit to a man of skill, in Paul, Jan. 5, 1859, 21 D. 206.

jurisdiction. On the contrary, "When parties have, by contract, agreed to a judicial reference, *that* is a contract like any other contract; and the Court has no more authority to put an end to that contract, than they would have to put an end to a contract for the sale of an estate or the lease of a house. It is irrevocably binding upon the parties, unless they have stipulated some mode by which they may get out of that binding contract."[1]

521. It was said, however, by L. Cranworth, C., in making the observation above quoted, that it was, "of course, subject to this remark, that every judicial reference must be taken to be with this qualification, that where, by the act of God, it becomes impossible that it should proceed, it is to be looked on just as if it had been inserted as a condition, *ex vi termini*, in the contract. Suppose the arbiter had died, what would have become of it? And other cases may be suggested, in which it would be impossible to proceed with the arbitration. And then, probably, the true construction of the law is, that the parties are remitted to their original rights."[2]

522. But, although the Court cannot encroach on "the contract" of judicial reference, by recalling the remit to the referee on any view of mere "expediency," as above stated, there may apparently be grounds for such a recall, besides those which (like the referee's death) create an actual impossibility to proceed before the referee. That any such grounds must be of a grave nature, is evident. But, suppose that it appeared to the Court, when disposing of an objection to the referee's procedure, that he had acted so as to disqualify himself from continuing to exercise his office, they would, in that event, decline to remit the cause anew to him.[3] Or, suppose the occurrence of any of those cases in which it would seem competent to apply to the Court to interdict an arbiter from proceeding further in an ordinary submission, it would, *a fortiori*, warrant an application for the recall of the remit to a judicial referee.

523. If, for instance, a referee had accepted a bribe from one of the parties, or had otherwise become tainted by personal "corruption," it would not seem necessary that an innocent party should nevertheless

[1] Per L. Cranworth, C., in Walker and Co., Aug. 14, 1855, 2 Macq. 424. On entering into the judicial reference, it had been anticipated that questions of legal difficulty might be involved in the extrication of the case; and power was expressly given to the referee, who was a civil engineer, "to report to the Court any point which may arise on which he thinks it necessary to take that step." On his making an interim report, accordingly, for guidance respecting a question of law, the Court "recalled the deliverance of the Judge, of 3d August 1852, interponing his authority to the minute of reference settled between the parties, and allowed the parties to proceed, as if no reference had been entered into." This interlocutor was reversed upon appeal.

[2] Walker and Co., *ut supra*, and 27 Scot. Jur. 323.

[3] Reid, Dec. 15, 1826, 5 S. 130.

wait, perhaps for years, until an award should be pronounced and reported to the Court by such a referee. He would seem to be entitled to apply forthwith to the Court, to recall the remit to the referee, and thereby cut short a procedure which must eventually be wholly abortive, and which, so long as persisted in, must involve waste of time, labour, and expense, and perhaps also the irretrievable loss of evidence. Without further enlarging on this, it may only be added, that the Court, in so recalling the remit to the referee, would not be in any way encroaching on "the contract" of the parties. It was no part of their contract, that either of them should be bound by the procedure of a corrupt referee; and it would be in perfect consistency with their contract, when soundly interpreted, to have the remit to any such referee recalled at the earliest moment.

524. It may be noticed here, that although no minute of reference had been lodged in process, yet, where the merits depended on the investigation of certain facts, and where the Judge, with consent of both parties, remitted to two counsel "to inquire into and to report their opinion as to the grounds of objection set forth on the record, but without reporting the evidence,"—this was held by the Court to be "in substance a judicial reference." The Court, accordingly, when the report of counsel was brought before them, decerned in terms of it, without further discussion; doing as they would have done in the case of a regular judicial reference.[1]

525. The interlocutor of the Court, which specially interpones authority to the minute of reference, and contains the remit to the referee, is obviously of the utmost importance to the procedure in a judicial reference, and should always be carefully attended to. But there is, at least, one case in which the unusual circumstance occurred, of an omission of this interlocutor, and in which, nevertheless, the referee's procedure was sustained. The parties executed the minute of reference, in Court, on the morning of an impending jury trial. On the faith of the minute, the jury were discharged, and the witnesses dismissed. Parties then appeared and pleaded, and also led proof before the referee. In these circumstances, it was held, after an award had been given by the referee, that the losing party was personally barred from then recurring, for the first time, to the omission of the interlocutor interponing the authority of the Court to the reference, and remitting the process to the referee. The Court, accordingly, repelled the objection founded on this omission, interponed their authority to the award, and gave decree conform, in the usual terms.[2]

526. The first step, under the reference, should be an act of

[1] Philp, Feb. 3, 1838, 16 S. 427.

[2] Fairley, Feb. 11, 1836, 14 S. 470. See apparently another case to the same effect; Laurie, June 14, 1814. Excerpt from L. Pres. Boyle's Note-book; Park. Syn. xxvi. 85.

acceptance by the referee. This may be done in the simplest terms, and is most conveniently written upon the minute of reference itself.[1] It has been observed, that the referee's minute of acceptance "is not essentially necessary."[2] This seems to be correct, inasmuch as, where parties appear and plead before a referee, and he makes and signs orders in that character, there is direct and irresistible evidence thus supplied, of his acceptance of the office, though he may not have originally signed an express minute of acceptance. But it is obviously proper that a step so vital, at entering on a reference, as the act of acceptance by the referee, should be duly attested by the referee's signed minute, so as to exclude every question, whether the *actum et tractatum* sufficiently instructed his acceptance without such signature.

527. The procedure before the referee under a judicial reference, such as the appointment of a clerk (where the services of a clerk are desired); examining the actual state of the process; and, if thought necessary, ordering claims, hearing parties, allowing proof, etc., according to circumstances: all this is so analogous to the procedure in an ordinary submission, as to supersede recapitulation. The powers and duties of a judicial referee, in these respects, appear to be substantially the same with those of an arbiter in an ordinary submission.[3]

528. Thus, although an interlocutor may have been pronounced, allowing a proof, before the judicial reference was entered into, it does not necessarily follow that under a judicial reference, the referee is bound to take that proof.[4] If the minute of reference itself does not contain any stipulation on the subject, it is competent to the referee (subject always to the same general conditions which affect an arbiter in an ordinary submission)[5] to decide, for his own government, and

[1] See form in Appendix. [2] Parker, 202.

[3] *Supra*, sec. 510; Brakenrig, Dec. 17, 1841, 4 D. 274.

[4] In an action before the Magistrates of Glasgow, for repetition of the price of the share of a vessel, after various documents had been produced, the Court allowed to both parties generally, a proof of their respective averments, so far as denied. At this stage of the procedure, a minute of reference was entered into, and the authority of the Court was interponed. The referee, a mercantile man, having heard parties, and considered the documents in process, and the admitted facts, gave an award against the defender, without taking the proof, which had been allowed by the Court. His award was reported to the Court, who interponed their authority, and gave decree accordingly. In a reduction of the decree, in respect, *inter alia*, of the referee's failure to take the proof in question before deciding, Lord Alloway, Ordinary, sustained the decree, and the Court refused a reclaiming petition, without answers. L. Alloway observed, in a note: "The judicial referee, or arbiter, might perhaps proceed erroneously, in not allowing a proof; but it certainly was within his power to determine whether the written evidence, and the admitted facts of the case, were not sufficient to enable him to determine the mercantile question, without further proof. He did hear parties, and even received a representation against the judgment, and made a slight alteration on it."—Colquhoun, Jan. 13, 1825, 3 S. 298.

[5] *Supra*, B. III. Chap. iii.

according to his own conscientious conviction, what amount of proof he shall require, or allow, before giving his award. On the other hand, though a process may be judicially referred as a "concluded cause," yet, if these words do not fairly purport a positive limitation of the arbiter's powers, it would appear to be competent to him, either to allow or to order proof, if he considered it to be requisite to follow that course, in order to enable him to perform his duty, and adequately prepare his mind for pronouncing the award.[1]

529. In a recent case, during the leading of a proof in the Sheriff-Court, objections were stated to various questions, in consequence of which the answers of the witnesses were sealed up, and so deposited in process, to meet the contingency of subsequent discussion taking place respecting them. The case was afterwards brought under advocation, and judicially referred. The referee gave his award without either opening up the sealed depositions, or making any special deliverance, finding that the questions were inadmissible, or otherwise disposing of them. On a motion being made to interpone the authority of the Court to the referee's award, it was objected that the referee had wholly failed to apply his mind to this part of the proof; that this omission appeared *ex facie* of the procedure; and that it was as fundamental a defect as a refusal to hear parties, or to give time to a party to lead the proof allowed, would have been. The Court unanimously repelled the objection. L. J. Clerk Hope observed: "I apprehend an objection to an award, which resolves into the allegation, that, either from want of attention, diligence, patient thought, or accuracy in the study of the case, the referee overlooked points, is wholly incompetent." His Lordship also remarked, that, in regard to the points raised by the objector, "there was no distinction between an award in a judicial reference, and a decree-arbitral."[2]

530. If the parties shall insert special conditions in the minute of reference, limiting the powers of the referee, and the minute so qualified shall receive the sanction of the Court, the referee's powers will thereby be as effectually circumscribed as the powers of an arbiter would be by the insertion of the same conditions in an ordinary submission. If, for example, the minute of reference limited the endurance of the reference to a specific period, it would appear that the referee could have no power to execute an award after the time so fixed had expired; and that the Court could not, without the consent of both parties, interpone their authority to such an award. But the case is essentially different when the minute of reference is unlimited as to time, and the Court, merely of its own

[1] This was so held, where a process was made the subject of an extra-judicia submission, in which it was described as "a concluded cause."—Berry, Dec. 15 1827, 6 S. 256; and Jan. 26, 1831, 9 S. 337.

[2] Campbell, Feb. 9, 1843, 5 D. 541.

authority, and for the purpose of enforcing laudable despatch, pronounces an order, which does not qualify the constitution of the reference, but is a mere direction to the referee, enjoining him to report within four weeks, or some other specified period. Accordingly, where the referee had not returned his report until shortly after a term so specified had elapsed, it was not held that his function, as referee, had *funditus* fallen on the expiry of the term in question, but only that he had not punctually complied with an order which was "merely a matter of Court regulation." Reasons of suspension of a charge upon a decree, pronounced by the Court in conformity with such an award, were therefore repelled.[1]

531. As the cause which is submitted to judicial reference is not thereby taken out of Court, great facility exists in obtaining diligence for citing havers and witnesses, or making any other incidental application to the Court which may prove requisite. The cause is simply enrolled before the Judge, like any other depending process, and the requisite motion is made in common form.[2]

532. The case of a private submission, noticed *infra*,[3] in which it was held that the Sheriff was entitled to grant compulsitors, *causa cognita*, for enforcing an arbiter's order against a haver to produce certain specified documents, would apply, *a fortiori*, to the effect of supporting an application to the Court before which the cause depended, to grant such compulsitors to enforce a similar order, made under a judicial reference by the referee.

533. From the nature of the procedure, the cause being still formally in Court as a depending process, and the judicial reference being merely the concerted method of ultimately obtaining a decree of the Court in the cause, it is requisite, when the referee makes his award, that he should report it to the Court.[4] This is indeed expressly enjoined by the interlocutor which remits the cause to the referee. The report or award does not require to be either stamped, holograph, or tested. It is just a step of process, and needs nothing for its authentication beyond the signature of the referee, who is an officer of the Court.

534. The referee's report or award does not recite, as matter of ordinary style, in the same terms which are used in an extra-judicial

[1] Robertson, Jan. 15, 1818. Excerpt from L. Pres. Boyle's Note-book: Park. Syn. xxxiii. 110.

[2] "The cause remains in Court, etc. In various respects, it is under the control of the Court. If the referee were to refuse to proceed, the Court would give redress. If he dies, the cause returns to the Court without new process. If witnesses refuse to attend, the Court would interpone its authority to compel them; and it is only by decreet of the Court that warrant for execution of the award can be obtained."—Per L. Moncreiff, in Mackenzie, Dec. 19, 1840, 3 D. 329.

[3] Blaikies, Mar. 2, 1852, 14 D. 590, B. VI. Chap. ix.

[4] *Supra*, sec. 531, note 2.

submission, that the referee, in making his deliverance, had "God and a good conscience before his eyes." But, in general, it briefly sets forth the nature of the procedure by means of which the referee had prepared himself to give his award, and adds that he is "now well and ripely advised" upon the matters remitted to him by the Court.

535. When the report or award is returned into Court, the Court is craved to interpone its authority thereto, and to pronounce decree in conformity therewith. Such a decree warrants the same execution as any decree pronounced in a litigated cause; and it stands on a basis which is not challengeable on any ground that would not invalidate a decree-arbitral or award in an ordinary submission.

536. When the award or report of a referee is thus laid before the Court, and a motion is made by one of the parties for the interposition of the authority of the Court, an opportunity is afforded to the other party of stating such objections to the motion as may, at that stage, be competently brought forward.[1] On this subject it has been observed, that all objections which could be urged in a process of reduction of an award, in a private submission, may competently be urged against the interposition of the authority of the Court to the award of a judicial referee.[2]

537. If the award or report of the referee be *ex facie* unexceptionable, and if it be commensurate with the reference—neither exceeding its limits nor falling short of them—the Court will not lightly be induced to refuse their authority to it.[3] But if it shall appear that the procedure before the referee has been, in substantial matters, inaccurate or defective, yet so as to admit of rectification by remitting the process anew to him, the Court are in the practice of so remitting.[4] This does not imply that the Court exercises any power of review on the proper merits of the reference; these are conclusively determined by the opinion of the referee alone, which the Court never disturbs. But irregularity of procedure by the referee, which, if it remained, might

[1] "A judicial reference is of a cause or suit before the Court, and the authority of the Court is required to be interponed, both to the reference and to the award, without which it is not competent, and diligence cannot proceed on it. Hence, objections may be stated when either of these judicial acts is applied for, because the Court is not blindly to add its authority to the act of either parties or referee, if good and legal grounds can be shown why the Court should not interpone its authority."—Per L. Medwyn, in Brakenrig, Dec. 17, 1841, 4 D. 280.

[2] "I think it is clear enough, that, when that motion is made, it is competent to object to it on any ground which would be competent and sufficient for setting aside an extra-judicial decree-arbitral, without the necessity of raising a formal action of reduction, as in the other case:" "all objections which would be competent in a reduction, must, I conceive, be competent to be then stated."—Per L. Moncreiff in Mackenzie, Dec. 19, 1840, 3 D. 318.

[3] See Robertson, May 30, 1833, 11 S. 659.

[4] Baxter, Feb. 20, 1836, 14 S. 549; and June 1, 1838, 16 S. 1085.

affect the validity of his award, may often be corrected by him under a new remit from the Court. The referee, under such remit, has the same powers which he originally possessed, unless the second remit be of a qualified nature.

538. Where a judicial referee, who erroneously supposed that he had not power to decide as to expenses, disposed of the merits, but reserved the question of expenses for the determination of the Court, the Court anew remitted to him to exhaust the reference by disposing of the question of expenses. The referee having thereon repeated his former award, with additional findings, which disposed of the expenses both of the process and the reference, and this award being reported, the Court then interponed their authority, and pronounced decree conform.[1]

539. It would appear that, if the award or Report be held open to objection on the ground of ambiguity, it would be competent to the Court to remit anew to the referee, with instructions to explain his award. This course was followed by L. Mackenzie, in the case of Anderson, etc., May 16, 1832, though the point did not then receive an adjudication from the Court,[2] the parties having eventually agreed to a remit to the referees to explain their award. And it will be observed, that one main reason which prevents any explanation from being obtained from an arbiter in a private submission, after he has given forth his sentence (viz., that the submission is at an end, and he is *functus officio*), does not apply to a judicial referee, so long as the authority of the Court has not been interponed to his award.[3]

540. If it shall appear to the Court, that parties have not been sufficiently heard before the referee, they may remit anew to the referee, with instructions to hold his award, *hoc statu*, as notes preparatory to his judgment; to hear parties further; and thereafter to do as to him shall seem just.[4]

541. If it be admitted that parties have not been heard at all before the referee, the Court may, and in most cases will, refuse to interpone their authority to the award, and will remit anew to the

[1] This occurred in the Burgh Court of Glasgow, and the procedure being brought under review in a reduction, it was approved by the Supreme Court. L. Alloway, whose judgment was adhered to by the Inner House, observed, in a note: "The Court most properly sent the cause back to the judicial referee, to determine the expenses, as necessarily falling under the reference of the whole cause which had been made to him."—Colquhoun, Jan. 13, 1825, 3 S. 298.

"In special cases, a remit may be made to supply any inaccuracy of procedure." —Per L. Medwyn, in Brakenrig, Dec. 17, 1841, 4 D. 274.

[2] See two reports of this case, 10 S. 534, and 11 S. 778.

[3] In one case, which came ultimately to be a reference, to which the authority of the Court was interponed, and under which the referee was required to report his deliverance to the Court, their Lordships, on considering it, remitted to the referee to explain an ambiguity therein.—Reid, Nov. 28, 1828, 7 S. 82.

[4] Baxter, Feb. 20, 1836, 14 S. 549; and June 1, 1838, 10 S. 1085.

referee to allow parties to be heard, and thereafter to proceed as to him shall seem just.[1]

542. In the event of its appearing to the Court, on considering the objections, not only that there are grounds for their refusing to interpone their authority to an award, but also that the referee is justly chargeable with such misconduct as forfeits the confidence of the Court, and indicates unfitness for his office, the Court will refuse to remit anew to such a referee. The Court may follow this course, either on the motion of a party, or *ex proprio motu*.[2]

543. From the inherent nature of the procedure, a judicial reference cannot embrace anything which is not within the scope of the process in which it is made. The decree to be ultimately pronounced by the Court, conform to the referee's award or report, must be within the conclusions of the libel, and cannot be made broader or more comprehensive, in consequence of the reference, than it could have been made without it. On the contrary, the award of the referee would be *ultra fines compromissi*, in so far as it went beyond what could (in point of form) be covered by a decree of the Court, supposing that the action had been prosecuted to a conclusion, according to the ordinary forms, and without the intervention of any reference.[3]

544. This does not prevent the parties to an action from having recourse to a reference or submission, which, besides the cause at issue,

[1] Lyle, June 15, 1844, 6 D. 1163. It may here be noticed, that, in the case of Glennie, Feb. 24, 1825, 3 S. 395, the Court opened up the award of a judicial referee, in respect that, after leading a proof, he had pronounced his award without hearing parties; and a remit was made to the L. Ordinary, to hear parties as on a concluded cause. But, unless the parties consented, or the case was otherwise of a special nature, it seems to deserve consideration whether the course which was followed by the Court in the later case of Baxter (sec. 540) was not more regular, when they remitted to the judicial referee himself to hear parties further, and of new pronounce an award. It is beyond the power of the Court to recall a judicial reference, without either the consent of both parties (Walker and Co., Aug. 14, 1855, 2 Macq. 429), or some such strong ground as that of the referee's having disqualified himself. And the act of withdrawing from the referee the decision of the case upon the concluded proof, and sending it before the L. Ordinary, would therefore appear to be open to observation, unless the case was affected by specialties.—Affd. on merits, May 11, 1829, 3 W. & S. 389.

[2] See opinions in Reid, Dec. 15, 1826, 5 S. 130, where the Court, *proprio motu*, refused to remit anew to the same referee, because by his conduct he had personally disqualified himself. In these circumstances, the parties agreed to name new referees.

[3] "By our rules and practice, it is impossible that such a reference should embrace anything which was not comprehended in the action, or issue, which forms the subject of it. For, as it proceeds entirely from the matter, so in issue before the Court; and, as the award must be confirmed by a decreet of Court, as in that cause; it is impossible that anything else should enter into it, or that the arbiter should have power to dispose of any other matter in dispute between the parties."—Per L. Moncreiff, in Mackenzie, Dec. 19, 1840, 3 D. 318. See also observations of L. Brougham, in Baillie, Aug. 27, 1835, 2 S. & M'L. 269.

involves other matters in dispute between them. But such a procedure would not be a proper judicial reference. If its nature were duly explained to the Court, the Judge would not interpone his authority to it, inasmuch as it consisted in part of a mere ordinary submission, with which he had no official relation whatever. Nor could decree be given by the Court in terms of the award eventually pronounced by the referee, as it must necessarily include matters not before the Court, nor within the process, with which alone the Court could deal. But the same party to whom, as judicial referee, the determination of a process has been remitted by the Court, may also be selected by the parties as their arbiter in a separate extra-judicial submission, to determine other matters in dispute between them. And he may proceed simultaneously with the judicial and with the extra-judicial references. It is only, however, in so far as the proper judicial reference extends, that the authority of the Court can be interponed to the award.[1]

545. It is only in the same process in which the reference has been made, and of which it forms a part, that the authority of the Court can be interponed to the referee's award. If, by any event, that process becomes extinguished, the reference, as being a step in the process, perishes along with it, and no authority can afterwards be interponed by the Court to any award by the referee. It is not within the contract of the parties to a judicial reference, nor is it congruous with the remit made in that process to the referee, that the award of the referee shall have the authority of the Court interponed to it, in any other process than that alone in which the reference was agreed to, and of which it forms a component portion, just as much as the summons and defences do.[2]

[1] In a case in which certain judicial references, and also certain other matters, were brought before the same arbiters, L. J. Clerk Boyle observed, in the particular circumstances, that the private submission had "absorbed the judicial references." —Fraser, May 26, 1838, 16 S. 1055.

[2] In a recent case in the Sheriff-Court, a judicial reference was agreed to, under which the referees pronounced an award. But the process itself had become irrevocably dismissed (by 16 and 17 Vict. c. 80, sec. 15, in consequence of the lapse of six months without procedure) before the interposition of the Court was asked to the award. In these circumstances, one of the parties brought a new action in the Sheriff-Court, and obtained decree against the other party, to make payment to him in terms of the award by the referees. In an advocation, the Court altered, and pronounced this interlocutor: "Find that the award sought to be enforced in the present action was pronounced in a judicial reference of a process before the Sheriff of Lanarkshire: Find that the said process is now absolutely extinguished and at an end, in virtue of the provisions of 16 and 17 Vict. c. 80, sec. 15; and consequently, that it is impossible the authority of the Sheriff-Court of Lanarkshire can now be interponed to the said award of the judicial referees: Find that such an award cannot be given effect to or enforced except in the process in which it is pronounced: Therefore alter and assoilzie," etc.—Gillon, Jan. 14, 1859, 21 D. 243.

Considering the severe stringency of the above provision of the Sheriff-Court

546. It is not uncommon in practice, that an action is taken out of Court, and made the subject of a submission, by the mere agreement of the parties, to which no authority of the Court is interponed. This proceeding does not partake of the nature of a judicial reference in any respect, although the dispute between the parties was originally in the form of an action before the Court. The summons, in such circumstances, serves no other purpose, except to define the limits of the pursuer's claims which are submitted; and the legal character of the proceeding is that of an ordinary extra-judicial submission.

547. The remuneration of a judicial referee is, in so far, on a different footing from that of an arbiter in a private submission, that the judicial referee, being an officer of Court, and acting under a remit from the Court, is entitled to remuneration; which, accordingly, is both legally and equitably his due.

548. If a party pays the judicial referee a fee for his remuneration, which is not objectionable in point of amount, the Court, when interponing their authority to the award, will decern against the other party for repayment of the whole fee, if the party who paid it has been found by the referee entitled to his expenses; and for repayment of one-half of the fee, if each party has been left to pay his own expenses. This course has been taken by the Court, although the referee, from motives of delicacy, had made no deliverance as to the liability of the parties for his fee.[1] In another case, in which the referee found one of the parties liable in expenses, inclusive of a fee to himself, if the Court should find him, as an officer of Court, entitled to remuneration, the Court found the referee and his clerk entitled to remuneration, and remitted to the auditor to tax the amount, in order to a decerniture for the same.[2]

549. Where a judicial referee had decided the case remitted to him, and the parties were agreed as to the amount of the fee which should be paid to him, but differed as to the proportion which should be paid by each of themselves, the Court remitted anew to the referee to decide the proportional liability of each party respectively. The referee reported that each party should be found liable in one-half, and the Court then interponed their authority to the whole award.[3]

Act, it seems proper to notice that six months had elapsed, not merely from the date of the last interlocutor by the Sheriff in the original process, but also from the date of the last proceeding in the reference. As the reference forms part of the process, it will probably be for consideration, when the facts shall raise the point, whether every "proceeding" in the reference should not be held a "proceeding" in the process, to the effect of eliding the statutory extinction of the process, so long as six months shall not have elapsed from the last "proceeding" in the reference.

[1] Yates, June 7, 1848, 10 D. 1233.

[2] Baxter, June 1, 1838, 16 S. 1085. See also Drummond, Mar. 11, 1835, 13 S. 684.

[3] Morris and Co., Feb. 14, 1852, 14 D. 501.

550. It is one of the characteristics of a judicial reference, which distinguish it from an ordinary submission, that, although no provision is made in the minute of reference for the casualty of one of the parties dying, the occurrence of that event will not put an end to the reference. The reason which has been assigned for this is, that a judicial reference is just one step in a procedure of a permanent nature, and that "the remit made by the judge to the referee is just as effectual as any other judicial remit, which does not come to an end by the death of a party."[1]

551. It is another peculiarity, distinguishing the judicial reference from the ordinary submission, that the former does not require to have any power of prorogation conferred on the referee. A judicial reference does not fall by the lapse of year and day. Apparently the same grounds which have been assigned for its endurance, notwithstanding the death of one of the parties, will equally explain its continuous subsistence without requiring prorogation. And, moreover, it would be incongruous that any private individual should have the power of performing an act which, if requisite for the continuance of his official character and functions, would, in fact, imply a renewal of the remit by the Court. Accordingly, no prorogation of a judicial reference by the referee is either known or required.

552. But, as the action, in which the judicial reference has been made, continues to depend in Court, it is necessary, if it be before the Outer House, that it be kept awake from time to time by motion in common form.[2] If the cause was before the Inner House when the reference was made, this procedure is not required, as a process does not sleep in the Inner House, though it be not moved in, for a year together.

553. Should the process be allowed to fall asleep, it must be wakened, in the same manner as any other process, before any further step can be taken in it in Court.[3]

[1] Watmore, etc., May 17, 1839, 1 D. 743. See especially the opinion of L. Mackenzie.

[2] Darling, 258; Parker, 209.

[3] In Stewart, Dec. 1, 1843, 6 D. 151, it was, *inter alia*, alleged that the referee had taken important steps in the reference, and even pronounced his award at a time when the process was asleep; and it was contended that all such procedure was null. It was answered, that such a plea was without support, either from principle or authority, and that at all events, it was excluded from the present case by the circumstance that the estates of the objecting party having been sequestrated, and the action in Court having been wakened, and the award of the referee reported to the L. Ordinary, his Lordship caused intimation to be made to the trustee in the sequestration, who wrote a letter, which was produced, stating that he would offer no opposition to the award, and declined to sist himself in process. The Court interponed their authority to the award by an interlocutor, which made special reference to the letter of the trustee.—See Session Papers.

554. If either party dies during the dependence of the judicial reference, and his representative does not voluntarily sist himself, it is necessary that the depending action be transferred against such representative, in the same manner as any other process would require to be, in which no reference had taken place.[1]

555. The death of the judicial referee, pending the reference, brings it to a close, and seems to leave either party free to insist on resuming the action in Court, unless both parties agree to enter into a new judicial reference, or to proceed otherwise, as they may be advised.[2]

556. As the process before the Court continues throughout to be a depending action, and as the award of the referee is reported to the Court, which then pronounces decree conform thereto in the said action, it is held that the diligence of Arrestment, or of Inhibition, used on the dependence of the action, subsists throughout, and will cover the decree so obtained.[3]

557. But if a process be made a subject of an ordinary extra-judicial submission, any diligence which may have been used upon the dependence will not cover the award pronounced by the private arbiter.[4] The diligence which has been used on the dependence of an action, necessarily from its own nature, becomes inept, unless that action be prosecuted to a decree. And this, of course, is not the case where the parties have extra-judicially agreed to submit their dispute to the judgment of a private arbiter.

558. When diligence has been used on the dependence of an action, and the action has thereafter been made the subject of an extra-judicial submission, the question has been raised, whether the submission necessarily had the effect of wholly and irretrievably evacuating the diligence? Or whether it might not be still competent for the pursuer of the action, in the event of his obtaining a favourable award, to produce the award in the action, and, upon obtaining

[1] Shand, 411; Darling, 259; Parker, 210.

[2] This would appear necessarily to result from the *delectus personæ* which is implied in the selection of the referee by the parties. In Walker and Co., Aug. 14, 1855, 27 Scot. Jur. 323, it was observed by L. Cranworth, C., *arguendo*, that, in such an event, "probably the true construction of the law is, that the parties are remitted to their original rights."

[3] "I understand it to be settled law, that an arrestment on a depending action undoubtedly subsists, whether decree in the arrester's action proceeds on the proper judgment of the Court, *causa cognita*, or in absence, or in default, or on an award in a judicial reference."—Per L. Moncreiff, in Potter, Nov. 17, 1847, 10 D. 109. See also L. Ivory, applying the same doctrine to inhibition on a dependence.—*Ibid.* p. 110. See also Shand, 411.

"There are certain advantages in having a judicial reference instead of a submission, such as the preserving diligence used upon the summons," etc.—Per L. J. Clerk Hope, in Brakenrig, Dec. 17, 1841, 4 D. 286.

[4] Reids, July 3, 1751 (6993).

decree from the Court, for the sum contained in the award, preserve the effect of the inhibition to the extent of that decree? In a case where this question arose, the Court, while they "found the sum awarded by the decreet-arbitral, not secured by the inhibition," inserted in their interlocutor the qualification, that this was without prejudice to the party, "to waken and insist in the former process, and there to claim preference upon the inhibition as accords."[1]

559. If a note of suspension be passed, on caution in common form, and if the question between the charger and the suspender be then submitted to a judicial reference without the consent of the cautioner, the cautioner is not liable, under his bond, to make good what may ultimately be awarded by the referee against the suspender, although a decree conform may have been interponed thereto by the Court.[2]

560. It was held, that both by the terms of the bond of caution, and the true nature of the transaction, the cautioner only undertook liability for the suspender, in so far as a debt should be found by the Court to be due, after a judicial discussion, conducted in their own immediate presence; the merits of which were considered and decided by the Judges themselves. It was observed, that the position of the cautioner in a suspension was, in many respects, analogous to that of a co-suspender, or party in the action; insomuch that, if the suspender failed to carry on his case, the cautioner might make appearance in the process for his own interest, and himself state all pleas which the suspender, if still appearing, could have stated. But, if the charger and suspender, by entering into a judicial reference, withdrew the process from being both discussed and decided on its merits before the Court, they placed the decision of the case substantially before a new tribunal, without the cautioner's consent. From which it followed, that whatever liability might, by this mode, be ultimately established against the suspender, it was not a liability ascertained by the only mode to which the bond of caution (which was to be strictly construed) could be held to apply.[3]

[1] Stewarts, Feb. 16, 1770 (7004); Hailes' Dec. 343. In Anderson, May 25, 1821, 1 S. 31, and F. C., it was held, with regard to an extra-judicial submission, "That an inhibition on a dependence is not put an end to by a subsequent submission, provided the reference be merely for ascertaining the amount of the inhibiter's debt; and that decree conform, in the action on which the inhibition was raised, is afterwards pronounced."

[2] Stewart, *infra*.

[3] Stewart, Dec. 1, 1843, 6 D. 151: "The obligation of a cautioner in a suspension is to pay a certain sum of money, 'in case it shall be found by the Lords of Council and Session that he ought to do so, after discussing the letters of suspension.' Hence, formerly, if the charge was turned into a libel, or the reasons were discussed on the Bill, the cautioner was not liable, because it was not a decree under the expede letters. To make the decree effectual, I think the discussion must be by this Court, in order to bind the cautioner, unless he consents to the

561. But the case of a cautioner in the loosing of arrestments was held to be "essentially different" from that of a cautioner in a suspension; "so much so," as not to "belong to the same subject."[1] Accordingly, where a pursuer's arrestments on the dependence had been loosed on caution; and the pursuer and defender had, thereafter, entered into a judicial reference, under which an award was pronounced; after which the Court gave decree conform to the award; it was held, that although the cautioner had not consented to the reference, he was as much bound to make good the amount for which he had become cautioner, as if there had been no reference, and the whole discussion on the merits had taken place immediately before the Court itself.[2]

562. It was observed, that, supposing there had been no loosing of the arrestments, and that the arrestee, at the close of the action, and after decree had been pronounced conform to the award of a judicial referee, had attempted to plead that the arrestments had been rendered unavailing in consequence of the judicial reference, such a plea, on his part, would have been obviously untenable. He was, *ex hypothesi*, liable to pay a certain sum, then in his hands, due to the defender in the action, but for the arrestments which restrained him, and which might eventually operate a judicial assignation of the debt to the pursuer. In that event, the arrestee would just be bound to pay the said sum to the pursuer, instead of paying it to the defender. But it was *jus tertii* to the arrestee, whether he paid this sum to the one party, or to the other, provided always that he only required to pay it once for all. As soon as a decree was recovered against the defender, which operated as a valid decree against him—the common debtor—that decree would entitle the pursuer to bring his action of furthcoming against the arrestee, who had neither title nor interest to object, that the decree against the common debtor had been pronounced conform to the award of a judicial referee. In such action of furthcoming, the pursuer must, accordingly, obtain decree against the arrestee, who could sustain no prejudice thereby.

563. But if so, the caution which was found in the application for loosing the arrestments, which was to the effect of making the arrested fund furthcoming, in the event of the pursuer obtaining decree, was just the surrogate of the arrested fund; and the cautioner came precisely into the place of the arrestee. Neither the arrestee, before the loosing, nor the cautioner thereafter, was a party, in any

reference," etc.—Per L. Medwyn, *ibid.* The other Judges—L. J. Clerk Hope, L. Moncreiff, and L. Cockburn—concurred; adhering to the interlocutor of L. Cuninghame. See, however, some observations as to this case, by minority of the whole Judges, in Potter, *infra*.

[1] Per L. Moncreiff, in Potter, Nov. 17, 1847, 10 D. 108.

[2] Potter, Nov. 17, 1847, 10 D. 97.

sense, to the action, on the dependence of which the arrestments had been used. Neither of them could make appearance in that action to state any defences, even in the event of the defender abandoning the cause. The defender, being absolute master of the conduct of his own cause, might refrain from defending himself at all, whenever he thought fit, or he might enter into a judicial reference, if so advised. And as the ultimate decree of the Court, conform to the award by the judicial referee, was a good and final decree in the action, *quoad* both parties to said action, that decree, if in favour of the pursuer, supplied all that was wanting to enable him to enforce against the cautioner in the loosing, the full liability of his bond; just as it would have enabled him to pursue a furthcoming against the arrestee, if the arrestments had never been loosed.[1]

564. With respect to the expenses of process incurred in conduct-

[1] Potter, Nov. 17, 1847, 10 D. 101. "The cautioner's interposition is simply that, at the proper time, the sum arrested shall be forthcoming, if the pursuer shall be in the right of the defender, to demand the sum attached. If the arrestment had not been recalled, the pursuer, upon producing the decree, no matter how obtained, whether *causa cognita*, by the Judge, or upon an award in a judicial reference, would have had the proper title to demand payment of the sum arrested from the arrestee, as in right of his debtor to whom the sum was due. The arrestee was owing the sum, and he must pay to the party now in right of his creditor. The case is nearly the same, as regards the cautioner in the recall of the arrestment. He is to be put in lieu of the arrestee. But the arrester's situation is not to be in any way impaired or altered," etc.—Per L. J. Clerk Hope, *ibid.*

"A cautioner, in a process of suspension, becomes a party to that suit, as between the charger and suspender—affected by all the proceedings in it—liable to all the results of it—and entitled to all the rights and privileges of a party so intervening. A cautioner, in the loosing of an arrestment, is very differently situated. It is an arrestment on a depending action between two other parties. With the pursuer of that action he has no privity or concern, and with the merits he has just as little." "The cautioner cannot appear in the process. No decree can be pronounced against him in it; and he has no title to complain of anything which may be done or decreed. These are two very different cases—different, not in accidental circumstances, but in essential principle," etc.—Per L. Moncreiff, *ibid.*

In this case, the whole Court were consulted. The quotations from the opinions of L. J. Clerk Hope and L. Moncreiff, who had decided the case of Stewart, *supra*, sec. 559, state shortly the grounds on which their Lordships held an essential distinction to exist between that case and the present. L. Medwyn and L. Cuninghame, who also had decided Stewart's case, concurred. L. Cockburn, however, who had concurred in the judgment pronounced in the case of Stewart, held that it was not distinguishable in principle from the present; and, while remaining of opinion that the case of Stewart, the cautioner in a suspension, was well decided, his Lordship, in this case of Potter, would have held the cautioner in the loosing of the arrestments to be also free from liability under his bond. L. Murray concurred with L. Cockburn. The other consulted Judges concurred with the Judges first mentioned, in holding that the cautioner in the present case was liable; but L. Mackenzie observed, that he did not approve of the judgment in Stewart's case, and L. Fullerton thought it should not, as a precedent, be lightly extended. L. Jeffrey doubted its soundness, and L. Ivory intimated that he reserved his opinion regarding it, as the point was not before the Court.

ing a judicial reference, it has been decided, that they cannot be claimed, beyond the extent of actual disbursements, by an agent who had not taken out the attorney licence. Because a case which is pending before a judicial referee is still a process in Court, and "business done before a referee is just business done in Court." This rule was applied, although the agent was also the party.[1]

[1] Ireland, June 25, 1851, 13 D. 1226. But an agent without the licence may sue for his professional account in conducting the business of an ordinary extra-judicial submission. "The Statute (9 Geo. IV. c. 49) cannot be construed to bar the agent from recovering outlays and professional charges for business not judicial, such, for instance, as that done in an extra-judicial reference." Per L. Rutherfurd, in Taylor, Jan. 13, 1853, reported in 24 D. p. 19.

BOOK VI.

SUBJECTS IN ARBITRATION LAW WHICH HAVE NOT BEEN CONSIDERED IN THE FIVE PRECEDING BOOKS.

CHAP.
I. The Clerk to the Submission.
II. Duration of the Submission.
III. Effect of the Submission of a Claim upon the plea of Prescription.
IV. Remuneration of the Arbiter.
V. Effect of Homologation upon Arbitration Procedure.
VI. Grounds of Challenge of an Award.
VII. Evidence admissible in reducing or defending an Award.
VIII. Subsequent use of Proof, which has been led in an expired Submission between the same parties.
IX. Procedure requisite for enforcing the attendance of witnesses before the Arbiter.
X. Use of action or diligence upon an Award.
XI. Stamps requisite in Arbitration Procedure.
XII. Non-concurrence among Arbiters.
XIII. Statutory Arbitration.
XIV. Foreign Award.

CHAPTER I.

THE CLERK TO THE SUBMISSION.

565. It is usual for an arbiter to appoint a Clerk to the submission, at the same time when he signs a minute of acceptance of his own office. He often receives express power to do so, but the power would at any rate be implied in all ordinary submissions. It is competent, however, for an arbiter to dispense with the assistance of a clerk, and to act as his own amanuensis, and otherwise perform the duties of clerk, if he think fit.[1] This, however, can rarely be an advisable course to follow, unless in submissions of a secondary class, as is evident on considering the duties which a clerk has to perform.

566. No technical style is requisite in making the appointment. It is enough that the arbiter appoints A. B. to be clerk to the submission. The clerk does not require to sign any minute of acceptance of his office; nor to take an oath *de fideli*. He is the clerk of a private person merely, the arbiter; and his office involves no public trust. It is understood, however, that the practice among arbiters is not uniform in regard to this subject.

[1] "When arbiters mean to appoint a clerk (for they may act without one if they please), they generally do so at the same time that they accept."—Per L. Cockburn, in Mowbray, June 2, 1853, 10 D. 1125. See also L. Medwyn's opinion, *ibid.* 1119.

567. In selecting the clerk, care should be taken to choose a man of character, who stands entirely indifferent between the parties.[1] He should have no interest in the matters under discussion in the submission, and no bias, either from partiality or from aversion, as regards either of the parties. It is true that, as his duties are chiefly of a ministerial character, it is not so essential in his case as in that of the arbiter, that he should be wholly indifferent and neutral; but the importance of it is so great, that, in appointing a clerk, it should always be considered a primary requisite. It is obviously proper, also, that a clerk should be selected who possesses intelligence and accuracy, besides some knowledge of arbitration law, in which there are technical rules requiring to be well understood and carefully observed in the conduct of the submission.

568. The office of the clerk to a submission very much resembles that of the clerk of Court in a process depending before a Court of law. His duties, accordingly, are very analogous to the duties of a clerk of Court.

569. The clerk to the submission writes out all the acts and minutes of procedure, and the interlocutors or orders by the arbiter, in the course of the submission. It will generally be found unadvisable to write anything, except the minutes of prorogation or devolution, upon the principal submission sheet, but the award may be conveniently written on that sheet, whenever there happens to be room for it. It belongs to the clerk to cause due notice of every deliverance by the arbiter to be promptly given to the parties.[2] When the depositions of witnesses or havers are to be taken down at length, the clerk writes these to the dictation of the arbiter (or at least under the arbiter's immediate superintendence), and sees that they are duly

[1] It may be noticed here, that, in special circumstances, where, in a submission to mercantile men summarily conducted without the attendance of counsel or agent, and without a clerk, the law-agent of the one party wrote the contract of submission, and the law-agent of the other party wrote the award, it was held that this last circumstance did not invalidate the award; however grave an element of objection it was held to be, in point of general principle, that the agent of either party should act as clerk to the submission.—Mowbray, June 2, 1848, 10 D. 1102.

[2] In a recent case, in which a party-submitter died, but the submission remained in force, it became necessary to transmit notice of an order by the arbiter to the executors of the deceased. The notice required despatch. Two of the executors and the law-agent of the executors, resided in Aberdeen. The third executor resided in Skye. The executors had corresponded with the other party-submitter, through their agent. The notice was given in due time to the agent, and also to the two executors in Aberdeen; but although duly despatched to the executor in Skye, it did not reach him in time, if it was necessary that he also should have received it. In a note of suspension and interdict by the executors, maintaining the invalidity of an award by the arbiter, the want of due notice of the order in question was, *inter alia*, founded on. The Court, in the circumstances, held that due notice had been given; and observed that notice to the agent alone would have been enough.—Anderson, Feb. 27, 1850, 12 D. 781.

signed by the witness, the arbiter, and himself. He preserves in his custody all the papers and productions which are lodged in the submission. He makes a process-inventory, in which all these are duly entered; and he should initial and date every document as it is first brought to him by the parties, so as to identify it, and preserve evidence of the time when it was presented. When papers are borrowed up, it is his duty to take receipts for them, so as to exonerate himself in accounting for their custody, and to furnish the requisite evidence, in the event of its becoming necessary to apply to the Judge Ordinary to recover possession of them. He ought to write all the interlocutors on a separate interlocutor-sheet kept for the purpose, as it is inconvenient, and may lead to oversight, if interlocutors be written in a detached form upon the several papers in process, according to no method or order. The clerk also attends the arbiter on every occasion when parties are before him for hearing or otherwise, so that he may write out the requisite minute or interlocutor, etc.

570. The clerk should retain in his own hands the principal contract of submission, and the principal interlocutor-sheet. The loss of either of these documents might be fatally injurious, or at least might occasion an expensive and inconvenient proving of the tenor. But the clerk should have a full copy of the submission, and of the interlocutor-sheet, in order to be lent to either party when required. And he should exhibit the principals, but without giving them out of his custody, to either party desiring to examine them.

571. It is material that the clerk should possess sufficient knowledge of arbitration law, to be able to advise the arbiter on all points of form. He should carefully observe at what date a prorogation of the submission requires to be made (where a power of prorogation has been conferred), and should bring this timefully before the arbiter, in order to prevent the submission from falling. A neglect of this duty by the clerk has, once and again, caused the miscarriage of a submission, after great expense and labour had been incurred, and the process was on the eve of being closed by an award. When any orders of the arbiter, to lodge papers or otherwise, are neglected by either party, the clerk should promptly draw the attention of the arbiter to the circumstance, so that the arbiter may take such steps for enforcing despatch as he may be advised.

572. The clerk should also be well acquainted with the form of executing a devolution of the submission, in the event of the arbiters differing from each other. Where the whole submission is to be, *de plano*, devolved upon the oversman, the clerk's duty is comparatively simple. But where the arbiters have received powers to pronounce part-awards, and have pronounced such awards accordingly, great accuracy is requisite to see that the devolution on the oversman omits nothing which the arbiters have left undecided, and includes nothing

which they have decided. He must also take care that, before devolving, the arbiters themselves have duly signed and executed their own part-awards, as probative writs; leaving nothing whatever to be still performed by them after signing the minute of devolution, as by that act they become *functi*.

573. Without entering into more details, which may generally be resolved into the single proposition, that the clerk should be well acquainted with the technicalities of arbitration law, it is important that he should be able to assist the arbiters in framing the formal part of the awards, interim and final, which are pronounced by them. He will, of course, take care that every award is written in the regular form of a probative deed, and that it is not in consequence of any omission of his, if it be not duly completed and executed before the expiry of the current term of the submission.

574. In all his procedure, the clerk is bound to obey the orders of the arbiters, whose officer he is. It may be noticed, in particular, that when any award is executed, and placed in his hands by the arbiters, it is of great moment that he should take accurate instructions from them, respecting the purpose for which he so receives it; whether in order to deliver it to the parties, or merely to exhibit it undelivered. To these instructions the clerk must implicitly attend; and perhaps it might be prudent for him, in some circumstances, to preserve written evidence of the instructions, as their tenor may make all the difference between a delivered and an undelivered award. Every award, while retained in the keeping of the clerk, for behoof of the arbiters, is truly retained in the keeping of the arbiters themselves; and is, accordingly, subject to alteration or revocation, during the subsistence of the submission, even although a copy of it may have been delivered, with the arbiter's sanction, to the parties.[1] It is otherwise, when a final award has been delivered to the clerk, for behoof of the parties.[2]

575. As the clerk's various duties are important, and cannot be performed without the exercise of considerable skill and labour, involving sometimes no small share of responsibility, they are always held to entitle him to suitable remuneration. His claim in this respect rests on an entirely different footing from that of the arbiter, which is purely honorary. The fee due to the clerk is a proper debt, exigible by action in Court, and for which the parties are conjunctly and severally liable to him, whatever may be their claims of relief against each other.[3]

[1] Gray and Woodrop, May 31, 1827, 5 S. 686; and July 8, 1831, 5 W. & S. 305.

[2] M'Quaker, Mar. 19, 1859, 21 D. 794.

[3] [In the case of a submission under the Lands Clauses Act, 1845 (8 and 9 Vict. c. 19, sec. 32), the rule appears to be different. In Burnet *v.* Henry, Nov. 30, 1866, 5 Macph. 96, it was held that the expenses of the clerk fall to be borne by the promoters of the undertaking.]

576. In order to found the clerk's claim for remuneration against the parties, it is not necessary, though it is usual and proper, that the award should contain express findings and a decerniture on the subject. The arbiter, in employing the clerk, acts as the quasi-mandatary of the parties; and the whole labour of the clerk is spent upon their affairs, and is *in rem versum* of them. Therefore, although the award be silent on the subject, or even when the submission falls without an award,[1] the parties are legally liable to remunerate the clerk to the submission.

577. In the event of the parties proving unable to pay the clerk's account, and of his seeking payment from the arbiter, as personally liable to him in consequence of having employed him, a question would be raised, which, it is believed, has not yet been made the subject of any decision. Some of the more obvious considerations, affecting such a question *hinc inde*, will be found stated *supra*, sec. 422, which treats of the claim of remuneration competent to men of skill, who have acted under remits made to them by the arbiter.

578. Where the arbiter, in his award, fixes the amount of the fee to be paid to the clerk, it would appear that the Court would not disturb this finding, unless there was an evident excess in the sum awarded. But if a decerniture was given for a plainly excessive amount, it would seem to be reducible, as to the excess, on the ground of being *ultra vires*. Neither the contract of parties, nor the Act of Regulations, protects a decerniture in an award which is open to challenge as being *ultra vires* of the arbiter. And as the power which the parties have, in this respect, confided to the arbiter, under the contract of submission, is merely the power of awarding fair and suitable remuneration to the clerk, any award which was plainly excessive would be, *pro tanto*, beyond the arbiter's power to pronounce. Even in the event, however, of such a decerniture being reduced, it is in its own nature so distinct from the body of the award, to which it is accessory, that the reduction of it *quoad excessum* would leave the body of the award as unchallengeable as before.[2]

579. The appointment of a clerk is pendent on the pleasure of the arbiters, who may recall it *quandocunque*, without reason assigned; and may either appoint a new clerk, or dispense with a clerk altogether, if they please. So, in like manner, the clerk who has been

[1] Macfarlane, June 29, 1842, 4 D. 1459. "The Lord Ordinary cannot have a doubt, that the clerk of a submission which lapses by an irreconcilable difference between the arbiters, or from any other cause not imputable to the clerk, has a legal claim against the parties for his professional labour and expenses."—Note by L. Cuninghame to his interlocutor, to which the Court adhered. [See also Burnet *v.* Henry, *supra*.]

[2] Gardener, July 10, 1741, Elch. Arb. 5, and 5 Br. Supp. 204; Macilhose, July 13, 1738, 5 Supp. 204; Jack, Mar. 6, 1777 (Dicty. Arb., Appx. 5), and other analogous cases.

appointed by the arbiters may be removed by the oversman, and another appointed in his place; as the oversman holds the same ample power in this respect, over his own clerk, which the arbiters do over theirs. And there are obvious reasons why an office of so confidential a nature as that of the clerk to a submission, should be under the unlimited control, first of the arbiters, and thereafter of the oversman, respectively. Even in the case where a clerk to the submission had been regularly appointed, and no recall of the appointment had been executed, it was found to be no objection to an award, that it was written by another party.[1] It was not disputed that the award, so written, was framed under the arbiter's sanction, and was signed by him, in token of its correctly expressing his judgment and sentence.

580. The account due to the clerk of a submission falls under the triennial prescription. An attempt was made to distinguish it from an ordinary agent's account, arising under a course of employment, by maintaining that the fee, or debt to the clerk, "being a *honorarium* for a single act of service, neither falls under the words nor intendment of the law." But the Court sustained the plea of prescription.[2]

CHAPTER II.

DURATION OF THE SUBMISSION.

581. WHEN parties enter into a submission, it is for themselves to regulate, at their own discretion, the period of its duration. They may either limit or extend this, according to their views of expediency in the circumstances of each respective case. The ancillary submission is indeed marked by peculiarities in regard to its natural duration, as well as in some other respects, which are considered by themselves at the close of this chapter. But when a submission is framed in the ordinary style, of which an example is given in the Appendix, its original term of endurance is for one year, and it falls on the lapse of that period, unless it has been timefully prorogated.

582. As already noticed, it is generally expedient to confer upon arbiters a power of prorogation of the term of the submission,[3]—a power which is intended to be exercised by them only in so far as they may find it necessary to enable them to prepare themselves duly for pronouncing their award. It may sometimes happen, however,

[1] E. of Hopetoun, Mar. 6, 1856, 18 D. 739.
[2] Farquharson, July 22, 1755 (11108).
[3] *Supra*, B. III. Chap. vi., as to the power of prorogation.

that parties not only expect with confidence that a submission can be brought to a close within a limited period, but, moreover, are of opinion that it is better for themselves to be free of the submission altogether, than to have it prolonged beyond that date. From this and other causes, submissions are frequently executed which contain no power of prorogation, and in which questions arise respecting the duration of the submission, according to the tenor of its original constitution.

583. When the contract of submission expressly fixes a limited time within which the arbiters are to give their decision, and contains no power of prorogation, the submission expires, *ipso facto*, on the elapse of the time so limited.[1]

584. In all cases, the submission comes to an end as soon as a final award has been pronounced and delivered by the arbiters. The whole object of the contract, and of every power which it confers upon the arbiters, being solely to the end that a final award may be obtained, the issuing of such an award immediately renders an arbiter *functus officio*, and brings the submission to a close.

585. When the contract of submission is so expressed, as to empower the arbiters "to determine against the day of next to come," it expires on the lapse of a year.[2] The same result follows where the clause is more briefly expressed, "to the day of next;"[3] or even although the blank be not followed by the restrictive words "next," or "next to come."[4] With respect to the question whether "year" means "year and day," and what period is covered by these terms, see *supra*, sec. 334. The cases of Thomson and Stark did not relate to the construction of a contract of submission, but of a minute of prorogation. But "the term of such prorogation is regulated by the same rules as in the case of an original submission."[5]

586. In computing the year, the date from which it begins to run is that when the contract was fully completed, which will generally be when the last of the signatures of the parties-submitters was adhibited to it. One case, however, bears that when a cautioner

[1] 4 Ersk. 3. 32; Cunningham, May 17, 1491 (635); Freeland, Feb. 28, 1666 (646); Pitcairn, Dec. 2, 1680 (647); Donaldson, Jan. 26, 1770 (Dicty. Arbn., Appx. 1).

[2] 4 Ersk. 3. 29.

[3] Thomson, Jan. 28, 1818, F. C.

[4] Stark, Dec. 23, 1820, F. C.

[5] Note 175 to 4 Ersk. 3. 29, Ivory's ed. See also Taylor, Nov. 25, 1800, F. C., in which the submission empowered the arbiter "to determine between and , or any other day to which he might prorogate the submission," and in which the arguments on both sides appear to have assumed that such a submission would fall by the lapse of a year, if not prorogated. The same point was decided by L. Alloway, Ordinary, and acquiesced in, although discussion proceeded on other points in the case.—Mackessock, Nov. 14, 1822, 2 S. 11. In this case no power of prorogation had been conferred, and the submission fell on the lapse of a year.

(Edington) for one of the parties did not sign till 24th July, while the parties had both signed on 3d July, and the award was pronounced in the following year on 15th July, the Court found "that the submission was not expired" at the last-mentioned date, in respect it was "within a year of the last subscription, being that of Thomas Edington, bearing date upon the 24th July of the preceding year."[1]

587. The award, which is quoted in the Session Papers, gave decree against "John Grieve and Thomas Edington, conjointly and severally, to make payment to John Taylor of the sum of £3487," etc. The submission itself is not quoted in the papers; but from the terms of the award, it must have contained a consent by Edington that the arbiter's decree might go out against him directly, and *in solidum*, as if he had been (*quoad* Taylor) a principal party equally with Grieve. The papers represent Edington as a man of wealth, and Grieve as having been ruined. In these circumstances, it may obviously have been the understanding and intention of all parties, that their contract was not fully completed until after Edington had signed. It does not appear from the papers that any procedure had taken place in the submission before Edington signed. Perhaps, in the case of a proper cautioner, who was only *subsidiarie* liable—especially if active procedure in the submission followed on the signature of the principals and before the signature of the cautioner—it might still be more prudent for an arbiter to execute a prorogation within the year from the date of the signature of the principal parties. See *infra*, sec. 593.

588. In one important case, a question arose respecting the date at which a contract of submission should be held to have been completed, so as both to admit and to require prorogation, *debito tempore*. The question was disposed of, as to this point, on the special ground of personal exception, which was held to bar the pursuer from any right to insist in the objection. But the case is instructive, with regard to the risk and expense which may be caused by a little inattention to regularity of procedure. Five conterminous proprietors signed a minute, agreeing to execute a regular submission to an arbiter named, with full power to him to perform certain extensive operations of drainage, bridge-building, etc., and to allocate the expense among the parties, in proportion to the advantage conferred by the operations on their respective lands. The submission was executed, and was signed by three of the parties chiefly interested. Operations involving much expenditure proceeded for years, under the arbiter's directions, on the faith that all parties were bound by the submission. But two of the parties, by mere oversight, did not sign the submission until after it must have fallen, if a prorogation which the arbiter had executed in the meantime was held not to be valid. When an award was pro-

[1] Taylor, Nov. 25, 1800, F. C.

nounced, one of the three parties who had first signed the submission, and who had seen all the operations going on without objection, brought a reduction of the award, *inter alia*, in respect that the contract of submission did not admit of being legally prorogated until after it had first been completed; and by the want of the signatures of two of the parties, it had not been completed until the lapse of year and day after the pursuer signed it, by which time he contended that it had necessarily fallen. The Court of Session pronounced an interlocutor, sustaining the defences generally; and, on appeal, L. Eldon, C., observed: "When one considers what was to be done—the channel of the river to be deepened—a bridge to be taken down, and another to be built—and that the pursuer saw all this going on, without making any objection at the time,—I think it is reasonable to take it as if he had said that he never meant to make the objection, and to hold that he should not be permitted to make it with effect, after the work had been finished."[1]

589. Where the submission contains no blank, but refers indefinitely the subjects in question to the decision of arbiters, without limiting them to any determinate time, it ought, like other contracts or obligations, to subsist for forty years.[2] This doctrine was illustrated in a case in which a question had arisen between a shipowner and the proprietors of some cotton wool, respecting the cause of certain damage which had been sustained, near Savannah, by a boatload of the wool in the process of being shipped. They addressed a joint letter to two merchants of Glasgow, stating this, and adding: "We hereby submit to your decision, which party ought and should sustain the loss occasioned by the damage on said cotton. You have full power to call for such documents, etc., and also to examine such persons, etc., as you may judge proper. Should it so happen that you do not agree in opinion, you are at liberty to elect an oversman, and your decision is to be final and binding on both parties." This missive was dated 2d September 1818. In November 1819, the arbiters having differed, appointed an oversman, who, on March 29, 1822, issued his award. No prorogation had been executed, either by the arbiters or by the oversman. The award was brought under reduction, *inter alia*, in respect that the submission had fallen by the lapse of a year from 2d September 1818, without a prorogation. The whole Judges were consulted, and ten Judges held that it had not fallen, or, according to the Faculty Report, perhaps the number of the Judges should be stated to be twelve. L. President Hope, Lords Craigie, Balgray, Gillies, Meadowbank, Corehouse, Medwyn, and Newton (2), observed, "As the letter of reference between the parties is not limited to any determinate time within which the arbiters or oversman were to give their award, and does not contain the usual

[1] Johnston, July 10, 1817, 5 Dow 264.

[2] 4 Ersk. 3. 29.

blank as applicable to the duration of the powers of the arbiters, we are of opinion that the powers of the arbiters and oversman did not expire at the lapse of a year from the date of the letter of reference, and that the parties were bound by the award, at whatever time pronounced." Lords Mackenzie, Cringletie, and Alloway concurred, resting their opinions both on the terms of the letter, and also, separately, on the circumstances of the case and conduct of the parties. L. J. Clerk Boyle, and Lords Pitmilly and Eldin, held that the submission had fallen by the lapse of a year.[1]

590. In connection with this subject, one of the reports of the case of Menzies[2] requires attention. It states that "a submission, bearing no day, betwixt and which the arbiters should determine, expires after year and day." But Lord Stair's report[3] of the same case bears that "the Lords found the decree-arbitral null, proceeding upon a submission of this tenor: submitting to the arbiters, aye and while they meet, at any day and place they found convenient, *with power of prorogation*, without any particular day for their giving their sentence, blank or filled up; because the decree-arbitral was not within a year of the date of the submission, nor any prorogation during that time." Apparently the insertion of an express power of prorogation showed it unequivocally to be the understanding of the parties, and the import of their contract, that the submission, if unprorogated, was not to be of indefinite duration. And if so, a practical rule, which was incidentally alluded to by L. Mackenzie, in his opinion in Fleming's case, would apply, admitting the "presumption of the intention of the parties to adopt one year, as a usual or reasonable time."[4]

591. Where a submission empowered the arbiters "to determine betwixt and the 22d day of December," it was held that an award executed upon the 22d day of December was good. "The Lords having considered that, in many such cases, decreets-arbitral have been pronounced on the last day, therefore find that these words, 'betwixt and the 22d,' include the day."[5]

[1] Fleming, July 7, 1827, 5 S. 841. A separate plea of homologation in this case is noticed, *infra*, B. VI. Chap. v.

[2] Feb. 1665 (639). [3] 2 Suppt. 137.

[4] If the passages in Balf. Arb. 413, and 1 Bankt. 23. 7, be at variance with the case of Fleming, they must be held to be now overruled.

In the case of Johnston, July 6, 1610 (637), a submission was sustained, which expressly empowered arbiters "to decide when they please, and the submission to endure as long as they will." This was held as importing an express agreement of parties, that the submission should be of indefinite duration.

It appears that in England, except where the Common Law Procedure Act applies, "if the submission limits no time within which the arbitrator is to make his award, his authority to make it will continue for his life, unless it be revoked." —Russ. 133, [4th ed., 125].

[5] Cockburn, Jan. 31, 1724 (640). See, to the same effect, Wilson, June 30, 1694 (647): "The Lords being clear that, in all these favourable cases, the day

592. A submission falls by the death of either of the parties-submitters, unless it be otherwise specially provided by the contract of submission.[1]

593. In the case of Robertson,[2] a proprietrix claimed arrears of rent from a tenant, who made counter claims. The tenant and the proprietrix were the principal parties to the submission; but the tenant entered into the submission "with consent" of two cautioners there specified; the proprietrix did so with consent of her husband. The tenant died, and also the husband. The cautioners then, who alleged that they held an assignation to the whole claim and interest of the tenant, insisted that they had a right to carry on the submission, seeing that they were consenting parties to it from the first, and, moreover, had in them the substantial interest. The proprietrix objected that the tenant was the only proper party-submitter, and that the submission necessarily fell by his death. The arbiter held the submission to be still subsisting, and proceeded to pronounce an award, which the proprietrix succeeded in reducing, on the ground that the submission had fallen by the tenant's death. During the discussion, the question was raised, whether the husband's death would, of itself, have caused the fall of the submission. L. Fullerton considered the point to be "not free from difficulty," in respect that the claims under submission were "for arrears of rent, which were therefore moveable, and consequently belonged to the husband himself." But no decision was given on this point.[3]

594. The parties may specially provide in the contract of submis-

betwixt and which it was to be done, was included." See also Monteith, Dec. 21, 1664 (644), 1 Bankt. 23. 13.

In England, where a reference was dated 29th June, and the award was to be made "within five calendar months thereafter," the Court held that the award, "being made on the 29th of November, was made in due time."—Higham (1840), 9 Dowl. 203. An arbiter, on 12th June, enlarged his time "until the 1st day of July next." He made his award on 1st July. An objection that the award had previously expired was repelled. The Court held that "there is no absolute rule as to the meaning to be attached to the word 'until,' as it may be construed either as inclusive or exclusive, and that, therefore, this construction should be put upon it; *ut res magis valeat quam pereat.*"—Kerr (1842), 1 Dowl. N. S. 538.

[1] "Submissions, like mandates, fall by the death of any one of the submitters." —4 Ersk. 3. 29.

"I have never heard it questioned, that, in the law of arbitration, the death of any one party to the submission, before decree-arbitral is pronounced, brings the powers of the arbiter to a close."—Per L. President Boyle, in Robertson, Feb. 6, 1847, 9 D. 599. The other Judges concurred.

[2] Feb. 6, 1847, 9 D. 599.

[3] See also 1 Bankt. 23. 15; Macanqual, May 14, 1563 (636). In England, it would appear that the death of a party also causes a submission to fall; it has been there decided, that where the party died on the morning of the same day on which the arbitrator subsequently pronounced his award, the award was void.—Potts, Nov. 22, 1814, 1 Marsh. 366.

sion, if they think fit, that it shall continue to subsist, notwithstanding the death of either of them.[1]

595. A submission falls by the death either of a sole arbiter, or of one of two arbiters, unless it be expressly provided that it shall continue to the survivor. In truth, after the death of one of the arbiters, in the absence of any such provision, that conventional tribunal no longer exists to which alone the submission was made. For this reason, a submission would seem also necessarily to fall by the death of one out of any number of joint-arbiters, where the contract did not expressly provide for the subsistence of the submission notwithstanding such an event.[2]

596. A submission does not fall by the supervening bankruptcy and sequestration of either party. Being a lawful and onerous contract, it remains binding on the bankrupt, like any other lawful and onerous contract into which he had entered before his sequestration. And although, by the operation of the law, a stranger (the trustee) is substituted for the bankrupt party, the Court have not held that this evacuates the contract of submission.[3]

597. But as the creditors of the bankrupt are the parties having the substantial interest in the questions at issue before the arbiter, it is necessary that notice be given to their trustee of the pending submission, so that he may appear for their interest, if so advised. If such notice be omitted, and no appearance is made for the bankrupt estate, any subsequent award will be liable to challenge,—the proceedings having been taken *parte inaudita*.[4] But if the requisite notice be given, the proceedings in the submission may be thereafter carried on to an effectual award, whether the trustee shall make appearance or not.[5]

[1] Ewing and Co., Dec. 19, 1820, F. C.

[2] 1 Bankt. 23. 15 ; 4 Ersk. 3. 34.

[3] Grant, June 23, 1820, F. C.

[4] Barbour, Nov. 21, 1811, F. C. The dates of the proceedings in this case, as taken from the Session Papers, bring out the application of the rule very strongly. The submission was entered into 10th May 1805. After much procedure in the submission, the sequestration of Lowden, one of the parties, was applied for, 16th July 1806. Some of the creditors opposed the application, and sequestration was not awarded till 11th December 1807. Meantime the award had been pronounced, 12th February 1807. There was a competition for the trusteeship, and confirmation of the trustee was not awarded till 20th December 1808. The L. Ordinary, Herdman, found it "admitted that the decreet-arbitral was pronounced after the date of the first deliverance in the sequestration of the respondent's estate, and that his creditors were not parties to the submission, or heard for their interest in the course of it, which is sufficient to set it aside." The Court adhered.

[5] Grant, June 23, 1820, F. C. Where one of the parties was sequestrated, the arbiter appointed intimation to be made to the trustee, so that he might appear for the creditors, if so advised. The creditors directed the trustee to make no appearance ; and he, maintaining that the submission had fallen by the sequestration, raised a declarator and interdict, to have it found that the submission was at an end, and to prohibit the arbiter from further procedure therein. The arbiter, nevertheless, went on with the submission, and pronounced an award, which the trustee brought under reduction. The Court assoilzied in both actions, and sustained the award.

598. In connection with this subject, it may be remarked, that where an award is pronounced against a sequestrated bankrupt, the award will be for the full sum due by the bankrupt, whether he has been discharged under a composition-contract or not. The award is a constitution of the debt which was due (though not constituted) prior to the bankruptcy. The creditor will rank accordingly for the amount, if the sequestration be still subsisting; and if the bankrupt has been discharged on a composition-contract, the creditor may give a charge to the bankrupt and his cautioners for the amount of the composition.[1]

599. It would not appear that the bankruptcy and sequestration of an arbiter should alone cause a submission to fall. If such an event were attended with circumstances which proved the arbiter to be personally disqualified for continuing to exercise the honourable and delicate trust which is inherent in the arbitral office, then he might be called on to renounce his office, and interdicted from further exercising it, just as might be done on any other occasion, if circumstances of personal misconduct happened to be discovered against him, which were sufficient to warrant such procedure. But, apart from this contingency, the mere fact that an arbiter had become pecuniarily insolvent, and that his own estate had passed into the person of a trustee for behoof of his creditors, does not appear to touch any of the personal qualities which are essential to the holder of the office of arbiter; and, consequently, no legal compulsitor for denuding an arbiter, or prohibiting his further procedure, in respect merely of his bankruptcy, would seem to be competent at the instance of one of the parties only. If both parties concurred, they could, of course, revoke the submission at pleasure.

600. It would appear, as already stated, that a submission should not fall by the marriage of a female party-submitter;[2] though the point is not free of difficulty. But notice would require to be given to the husband to appear for his interest, otherwise the subsequent procedure would be irregular, and the award reducible.[3]

601. The effect which would be produced upon the duration of a submission by the death of a pupil whose tutor was a party-submitter, or by the pupil's reaching puberty, or by the death of the tutor, has been already considered.[4] The death of a minor, who was a party-submitter, would cause the fall of the submission, equally with the death of any other party-submitter, seeing that the minor has a *persona standi*, and is himself the party, both in form and substance, to the contract of submission. For the same reason, the death of his curator would not cause the fall of the submission, the proper party-submitter

[1] Smith, etc., June 13, 1828, 6 S. 975. [2] Sec. 169 *et seq.*

[3] Maitland, May 18, 1796 (641); see note, p. 107; see also Barbour, Nov. 21, 1811, F. C., noticed *supra*, sec. 597.

[4] *Supra*, sec. 181 *et seq.*

(the minor) being still sisted in the submission as much as before.[1] But it would be necessary that the opposite party, for his own protection, should, in such an event, require the minor to choose another curator, so that his interests under the submission might be duly cared for. And if the minor should refuse this, it would appear to be within the power of the opposite party either to decline to appear further in the submission, and to set aside any award which might thereafter be pronounced in his absence; or else to obtain an interdict against further procedure in the submission. Because a party would be placed at an unfair disadvantage, if compelled to carry on any procedure in which an undefended minor is the antagonist. And it would seem that the Court would not allow a minor to require either an unwilling opponent, or an arbiter, to proceed with a submission, while he, the minor, refused to place himself in the only proper position for duly performing his own part therein, by choosing a curator to attend to his interests.

602. With respect to the question, whether a submission falls by the death of a cautioner, as it does by the death of a principal party, it will be observed, that in the case of Maitland,[2] though no decision on the point was given, it may apparently be gathered from the brief note of L. President Campbell's opinion, that he would not have held the duration of the submission to be affected by the death of a cautioner; the cautionary obligation remaining in force nevertheless. The more recent case of Robertson[3] indicates so strongly the distinction between the accessory position of a cautioner, and the character of a principal party-submitter, that it may probably be relied upon, that the death of a cautioner would not cause the fall of an ordinary contract of submission.[4]

603. A submission comes to an end at any time when both of the parties to the contract may agree to terminate it. As it depended entirely on the will of the parties to enter into the contract at first, so it is within their power, by joint consent, to bring it to a termination when they please. But the contract of submission cannot be recalled, more than any other onerous contract, at the pleasure of one of the parties, without the consent of the other.[5]

[1] See this view incidentally expressed in the opinion of L. Fullerton, in Robertson, Feb. 6, 1847, 9 D. 599, when considering the effect of the death of a husband, viewed as the curator of his wife, the proper party-submitter.

[2] *Supra*, p. 107.

[3] *Supra*, sec. 593.

[4] See, however, Taylor, Nov. 25, 1800, F. C., *supra*, sec. 586.

[5] In this respect the law of England was remarkably at variance with the law of Scotland, prior to the statute 3 and 4 Will. IV. c. 42, sec. 39, which has, in a large class of submissions, materially impaired the power of a single party to revoke. —Russ. 154, [4th ed. 140]. See *supra*, sec. 24. It still remains very different, however, from the law of Scotland, which simply holds it to be out of the power of either party, singly, to shake himself free of an onerous contract.

604. A submission may also be brought to an end in consequence of the arbiter, for adequate cause, executing a renunciation of his office. What cause shall be held sufficient to warrant this demission of office, has been already considered."[1]

605. If an arbiter, in the execution of his office, which is one of high and honourable trust, should so misconduct himself as to evince corrupt partiality, or other gross personal miscarriage, of a kind which is plainly incompatible with the honest and faithful performance of his duty, it would appear to be competent to either party thereon to revoke all power conferred by him on such arbiter under the contract of submission, and to apply for an interdict against his further proceeding to act as arbiter. In the case of Drew,[2] it was on the merits, and not on the competency, that the conclusion for interdict was held defective. L. Brougham observed, that there might be cases "in which it would be justifiable in the Court to stop what is called a going submission." "Such cases may arise. I can imagine one, very easily, of gross corruption on the part of the arbitrator." "But nothing of the sort occurs in the present case."[3]

606. Or suppose that an arbiter entertains claims which are clearly beyond the limits of the submission, it would seem competent to apply for interdict against his so proceeding. Such questions have generally been raised in a reduction of an award, but this is not the only course which can be followed. Where the facts of the case are strong, a party who is shut out from a Court of law so long as the submission subsists, would not seem bound to allow further procedure to take place in a submission which must eventually be abortive; or to wait for an award which must be reducible. Accordingly, in a recent case, where an arbiter was entering upon important subjects which were not within the submission, a party was found entitled to decree in a declarator and interdict, prohibiting him from proceeding further; and was not held bound to wait until an award should first be pronounced, and then bring it under reduction.[4]

607. So long as no interdict is actually granted, an arbiter may competently proceed with the business of the submission, notwithstanding that there is a pending process of interdict, aided, it may be, by an attendant process of reduction of the award.[5] Otherwise it would

[1] B. III. Chap. viii.

[2] Mar. 8, 1855, 2 Macq. 1.

[3] In the same case, L. Cranworth, C., explained the summary mode of application in England for stopping procedure in a pending submission, and also the manner in which the application may be resisted. See also Fraser, July 5, 1834, 12 S. 887, where the summary measure of a bill of suspension and interdict against an arbiter was resorted to, and disposed of on the merits.

[4] Pearson, Feb. 4, 1859, 21 D. 419. See also Grant, June 23, 1820, F. C.; and Farrell, July 14, 1857, 19 D. 1000; cases which were disposed of on the merits, and not the competency.

[5] Grant, June 23, 1820, F. C.

be in the power of any dissatisfied party, by merely presenting a Note of suspension and interdict, to break up a submission, or to delay it indefinitely.

608. The duration of the Ancillary submission is marked by various attributes which distinguish it from the ordinary submission. The ancillary submission, in place of being in itself an independent and principal contract, forms a constituent part of another and primary contract to which it is merely auxiliary.[1] It therefore possesses a natural term of endurance, which, generally speaking, is co-ordinate with that of the contract of which it forms a part. But where there are disputes subsisting at the expiry of the term of the primary contract, which the submission-clause was intended to decide, and which either party requires the arbiters to decide, the submission-clause remains in force, after the termination of the primary contract, to the effect of enabling the arbiter to determine these disputes.[2]

609. The ancillary submission does not fall, although the arbiters named therein should not accept until after the lapse of year and day from the date of the primary contract; and, consequently, also from the date of the ancillary contract.[3] It does not require to be prorogated.[4] And where the primary contract is binding, not only upon the parties, but also upon their heirs, the ancillary contract will not fall by the death of a party, without an express provision to that effect.[5] This doctrine applies, *a fortiori*, where *rei interventus* has taken place on the faith of the contract.[6]

610. In a proper ancillary clause of submission, which is made part of another contract having a definite endurance, such as a lease, and which is meant to be operative throughout the whole lease, even the delivery of an award by the arbiter, if this takes place during the currency of the lease, will not bring the submission to an end, although he has not set forth, *in gremio* of his award, that it was an

[1] See *supra*, sec. 123 *et seq.*

[2] *Supra*, sec. 130 *et seq.*

[3] Brysson, June 10, 1823, 2 S. 340.

[4] 1 Bankt. 23. 7; Halkett, Dec. 16, 1826, 5 S. 140; Boswell, Feb. 3, 1669 (9152); Montgomerie, Dec. 8, 1840, 12 D. 274.

[5] "In ordinary private submissions, it is true that, generally speaking, the submission falls by the death of either party unless it contains a clause which expressly provides for its endurance. But where even a private submission is entered into as part of a contract—such, for example, as an agreement of sale—the death of one of the parties does not evacuate the submission, because it is part of a permanent contract. It is mixed up with a transaction which is not terminated by the death of a contracting party, and, by necessary inference, it is also exempted from so terminating."—Per L. Mackenzie, in Watmore, May 17, 1839, 1 D. 743. That was a case of judicial reference; but the doctrine of L. Mackenzie was rested on general principles, not limited to a judicial reference. See also Orrell, Feb. 22, 1859, 21 D. 554.

[6] E. of Selkirk, Jan. 17, 1778 (627), Hailes' Dec. 780.

interim-award; "for, as the submission embraces all the disputes between the parties which may occur during the currency of the lease, it is not in the power of the arbiter to pronounce a final decree till the lease expires."[1]

611. A submission under an ancillary clause in a contract does not appear to fall by the death, or disqualification, or by every miscarriage of the arbiters. In the case of Reid,[2] where the Court held that the arbiter had disqualified himself, they also were of opinion that the agreement to submit was still to be carried out. The parties accordingly named new referees. In the case of Dixon,[3] where a submission-clause was inserted in a coal lease, for determining, by the opinion of two skilled men, whether the coal was workable at a profit, and where two arbiters were eventually named, who disagreed in opinion, and could pronounce no award, the Court refused to hold that the agreement to submit was even then at an end. It was held to remain in force, so that the parties required to carry it out by a new nomination of arbiters. And in the case of Smith, Feb. 28, 1843, 5 D. 749, where two arbiters who were named under a submission-clause in a lease, had given an award which was reduced for irregularity, the Court held that the agreement to submit was still in force, and refused to send the question at issue before any other tribunal than that of arbitration, as provided by the agreement of the parties.[4]

CHAPTER III.

EFFECT OF THE SUBMISSION OF A CLAIM UPON THE PLEA OF PRESCRIPTION.

612. In the long negative prescription, the creditor's silence throughout the whole course of forty years presumes an abandonment of his claim, and deprives him of all right of action upon his contract or obligation.[5] To save the creditor from this prescription, he must "follow the said obligation within the space of forty years, and take

[1] Per L. Mackenzie, in Montgomerie, Dec. 8, 1849, 12 D. 274.

[2] Dec. 15, 1826, 5 S. 130.

[3] June 25, 1830, 8 S. 970. With respect to obviating the difficulty which may result from the disagreement of two arbiters who have no power to name an oversman, see Merry and Cunningham, June 7, 1860, 22 D. 1148, [March 26, 1863, 1 Macph., H. L., 14]; *supra*, sec. 344. See also Cochrane, Feb. 3, 1859, 21 D. 369; 31 Scot. Jur. 205; and Mar. 30, 1861, 33 Scot. Jur. 430.

[4] [If the period for which the principal contract was entered into be extended, the ancillary clause of submission remains in force by necessary implication. Birrell *v.* MacCulloch and Fyfe, Nov. 30, 1866, 5 Macph. 94.]

[5] Erak. 3. 7. 15.

document thereupon;" an obligation that is "unpursued by the party," or "not followed," for forty years being prescribed.[1]

613. It has been decided, that where parties enter into a submission of a claim of debt which only suffers the long prescription, this proceeding negatives the presumption of abandonment or neglect of the debt by the creditor, and interrupts prescription. Though the submission should become abortive, in consequence either of the death of the arbiter, or of the death of one of the parties-submitters, and thus never proceeds the length of an award, it has, nevertheless, had the effect of interrupting prescription.[2] It has removed the legal basis on which that prescription rests.

614. On this subject Bankton has observed:[3] "A general submission of all questions, claims, and demands will not interrupt as to any particular, unless it is made to appear in a proper way that a claim was entered upon it before the arbiters; for otherwise it cannot be more effectual than a blank summons executed, which, if not filled up and judicially called within the forty years, does not interrupt the long prescription. But where a submission is particular, or upon a general submission particular claims are entered before the arbiters, the prescription as to these particulars is interrupted in the same manner as if they had been judicially claimed by action, even though no decree-arbitral should follow on the submission; because, by the consent of parties, the claims are made before arbiters, in place of judges, and consequently the creditor is following out his obligation."

615. With regard to any particular claim which is not "entered upon before the arbiters," under a general submission, such particular claim is left precisely in the same position as if no submission at all had taken place. Or rather, the presumption of such particular claim

[1] 1469, c. 28, and 1474, c. 54. See also 1617, c. 12.

[2] Claims by a factor against his constituent, and counter-claims by the constituent, arising out of intromissions which had terminated in 1754, were made the subject of a submission in 1773, which fell, without an award, by the death of the arbiter in 1796. The same subject-matters were anew submitted in 1798, but the submission again fell, without an award, by the death of one of the parties in 1812. In 1814, an action was raised by the factor's representative, for payment of the alleged balance on the foresaid factory accounts, in defence against which the plea of prescription was stated. L. Pitmilly, Ordinary, repelled the plea, and the Court refused a reclaiming petition without answers.—Vans, June 14, 1816, F. C. In adverting to this case, in a note to Dunn (*infra*, sec. 618), L. Rutherfurd observed: "A submission, with reference to a particular demand, was held to be tantamount to a judicial pursuit of the demand, and to interrupt the operation of the long prescription."

The case of Hay, Mar. 19, 1756 (11276), is not at variance with this. In that case there was no actual submission, but merely an obligation to submit—granted by a party who was not himself to be the party-submitter—and which was followed by extending a deed of submission, which was never signed or acted on.

[3] 2. 12. 62.

having been abandoned, seems to be rendered stronger than otherwise, by the very fact that a general submission of all claims has been made between the parties, and nevertheless this particular claim has not been stated under the general submission. It has, accordingly, been decided, in accordance with Bankton's doctrine, that the operation of prescription, with respect to such particular claim, is not interrupted by a general submission.[1]

616. If the full term of the long prescription has already run, before parties enter into a submission for determining whether a claim, which one of them denies to be due, is still resting-owing, it has been laid down that the entering into a submission in these circumstances does not take off the plea of prescription. The act of submitting, in such circumstances, is merely a consent by the parties that an arbiter, or private judge (in place of a Court of law), shall decide on the defences against the claim, including the defence of prescription itself. Although, therefore, by entering into the submission, a party becomes bound to abide by the award, if the arbiter shall repel the plea of prescription, however erroneously, yet if the submission shall eventually fall, without an award, it remains as free to him to plead prescription, in defence against any subsequent action, as if no submission had been ever entered into.[2]

617. With respect to those claims of debt, the proof of which falls under the prescription of the Act 1579, c. 83, unless they be "persewed within three zeires," the Court had occasion recently to express their opinions in the case of Dunn.[3] In the circumstances of that case it was held, that although the period of three years had run, yet the effect of a submission which was entered into, in connection with a judicial reference, during the currency of the three years, and which lapsed through the arbiter's death without an award, after the expiry

[1] Garden, Nov. 26, 1743 (11274). Action, in 1743, on a bond granted in 1697. Defence—prescription. Reply—a general submission between the pursuer and defender, in 1728, of "all claggs, claims, or controversies between them." The Lords "repelled the interruption founded on the submission."

Kilkerran, in reporting the case, observes that "a general submission is no interruption of the prescription of any claim." And the Court, in adverting to it in the case of Vans (*supra*, 613), remark, that "the finding in the case of Garden *v.* Rigg was merely that a general clause of all clags, claims, etc., did not interrupt prescription against all particular debts." L. Ivory, in adverting to the same case, explains that the reason why prescription, as to the particular claim, is not elided, is this: "*Non constat* that the particular demand in question was in the view of the parties in making the submission. See Dunn, June 14, 1854, 16 D. 953. L. Kilkerran has further observed, in Garden's case, that "it was even doubted (by the Court) if a special submission, now cancelled, would be an interruption." It may be well to notice, with respect to this, that, in the subsequent case of Vans (*supra*, 613), a submission which had become abortive by the arbiter's death was found to interrupt prescription.

[2] 2 Bankt. 12. 63.

[3] June 14, 1854, 16 D. 944.

of the three years, was to prevent the debt from falling within the Act 1579, c. 83, and to leave it still probable, *pro ut de jure*.[1]

618. A Sheriff-Court action was raised by Dunn against Lamb, for payment of an account. Lamb produced, with his defences, a state of accounts, according to which he maintained that the pursuer's claim was satisfied. Among the accounts thus produced by Lamb, was a sum of £21, 15s. 9d., being an account for work due by himself to Dunn, but which was not embraced within the conclusions of the summons. It was, nevertheless, brought under judicial discussion after Lamb had produced it, and founded on the state of accounts of which it was a part. After some procedure, a judicial reference was made by the parties. Being doubtful, apparently, whether this would effectually include the above item of £21, 15s. 9d., the parties afterwards executed a submission, to the same referee, bearing, *in gremio*, to be made for the purpose of enabling him to settle the above item of account, along with all other matters in dispute.

These proceedings, which took place within three years from the close of the account in question, fell, without any award, in consequence of the death of the referee. Afterwards, and when the three years had already run, a new judicial reference, to another referee, was entered into; but it fell in like manner, without an award, and Lamb refused to agree to a new reference. Thereon, the original action was anew insisted in, and a separate action was raised by Thomas Dunn, for payment of the £21, 15s. 9d., to which the defence of prescription was pleaded. The Sheriff sustained that defence, and Dunn advocated. L. Rutherfurd, Ordinary, recalled the interlocutor, and found "that the present case does not fall within the provisions of the statute 1579, c. 83, but that the pursuer is entitled to prove his demand *pro ut de jure*." His Lordship observed, in a note: "Here, it is true, the creditor did not produce the account referred to; but the defender, who founded upon it, and brought it into the case, can hardly say that the pursuer is in a worse situation than if he had founded upon it judicially, as compensation or recompensation; and, above all, there is the submission, not of the original action merely, but specially of this particular claim, as connected with the original action; and that submission undoubtedly was a suit brought within the three years, and under which the creditor might have recovered payment of the debt. It was proper and competent for that purpose and effect. It was, to all intents and purposes, an action; and, moreover, was a judicial proceeding, having reference to an action already raised before the Sheriff, in which the claim in question was pleaded,

[1] The important doctrine in this case—viz., that the insisting in a claim under a submission within the three years, elides the triennial prescription just as if the claim had been pursued in an action at law—was recognised in the opinions of the Judges in deciding Eddie *v.* Monkland Railway Company, July 5, 1855, 17 D. 1045.

and being partly intended to remove any difficulty as to the claim being included in the action. The L. Ordinary therefore thinks that the operation of the statute is precluded, by the claim having been competently pursued within the three years. Separately, he is of opinion that the defender would be barred by personal exception from pleading prescription. But for the proceedings under the submission, the pursuer would have brought the present action in 1847, within the three years; and that period has only elapsed without an action being brought by the pursuer, because the defender agreed, within the three years, to a course of proceeding by which, if regularly carried through, the debt would have been made good."

619. On a reclaiming Note, the Court adhered. L. President M'Neill observed: "In the first place, the account was tabled in the original action, and discussion raised on it. I do not go much on that, for no decision has been given in that action. But then we come to the reference. It raises the question, whether, if the parties, within the years of prescription, submit the claim for count and reckoning to an arbiter, and that submission falls by the death of the arbiter—not by the fault of the party—and after having endured till after the period of prescription has run, is either party open then to the plea of prescription?" "I think, in the first place, that the plea is obviated by the proceedings which took place, just as much as in any claim in a mutiplepoinding; and that the failure of the tribunal before which the question depended is not a matter for which the party is responsible." "The party did insist in a Court, in a competent form. That form of proceeding, and the failure of it by the death of the arbiter, is one answer to the plea of prescription." "Another answer is, that the party having gone on, in that course of proceeding, till after the period of prescription, cannot plead that defence. I think that the party who brought the case into that tribunal is barred by personal exception from pleading prescription."

L. Ivory concurred with the L. President, and also with the reasoning in the Note of the L. Ordinary. His Lordship observed, *inter alia*, that "it is clear that there was a transaction between these parties in reference to this matter, in which the unavoidable implication was, that no prescription was to be pleaded against this account." The other Judges concurred.[1]

620. In a case which occurred shortly afterwards, a question was raised, how far an alleged agreement to submit, if completed during the subsistence of a right of action which was limited by statute to six months, and if followed by a submission, would have the effect of saving the right of action, so that it could still be insisted in,[2] after the lapse of the statutory period, in the event of the submission

[1] Dunn, June 14, 1854, 16 D. 944.
[2] Dudgeon, Jan. 28, 1859, 21 D. 351.

proving abortive. The majority of the Court held that the statutory limitation had taken full effect, and the right of action was at an end. It should be observed, at the same time, that some of the Judges held it not to be satisfactorily established, that any completed agreement to submit had taken place within the six months; and there had been no submission till after that term had expired.

621. This case requires attention, especially in respect to its bearing on the preceding case of Dunn, which the majority of the Court held to be a different case, while the minority held it to be a precedent in point. It was pleaded by a road-surveyor, in defence against an action of damages, that it was incompetent; being cut off by the limitation in the General Road Act, which declares that such action "shall be commenced within six months" after the date of the injury, "and not afterwards." The pursuer answered, that, though six months had elapsed before the date of the action, yet, within the six months, a correspondence between the parties had resulted in an agreement to submit the claim of damages to arbitration. This had the effect of barring the defender from afterwards resorting to the statutory limitation when the submission proved abortive. The defender denied that such agreement had been completed until after the six months had run, and contended that, at all events, he never had waived his right to plead the statutory limitation. In point of fact, no submission was actually entered into till after the six months had run. The award pronounced under the submission, being supposed by the pursuer to be invalid, he resorted to the action of damages in which the above defence was pleaded. The L. Ordinary, Kinloch, "repelled the defence of incompetency," and observed in a note, that the "defender, by his own proceedings, waived the privilege of the statutory limitation, and cannot now resort to it. The principle applicable to the case appears to be that which was recognised in Dunn *v.* Lamb."

622. On a reclaiming note, the Court altered the interlocutor, and sustained the plea of incompetency. L. President M'Neill observed: "It appears to me that the plea of personal bar cannot be sustained." His Lordship then stated that the submission had not been entered into until after the six months had run; that the previous correspondence, within the six months, had been but imperfectly produced; and that "it would be very hazardous to hold, that a correspondence, of the kind we have here, is to exclude the application of the Act of Parliament." "The case of Dunn *v.* Lamb is essentially different from the present. First, there was there a judicial reference; second, the action was begun within due time; third, the reference had fallen through, not by reason of the fault of anybody, but in consequence of the extinction of the Court in which it was going on; fourth, it was not decided solely on the ground of personal bar, but on a careful

view of the whole case. Therefore, though the party here may have come under an obligation to submit, I do not think he came under any obligation not to plead the statutory limitation."

623. L. Ivory intimated his concurrence in the interlocutor of the L. Ordinary, and in his Lordship's remarks on the case of Dunn; and further observed, *inter alia*, that "the substance of Dunn's case is, that where parties entered into a submission, in regard to a claim which would otherwise have fallen under the triennial prescription, the bringing the claim, within the three years, before a voluntary Court—which the Court of the arbiter is—was to be held in law, as equivalent to bringing the claim before a competent judicial tribunal. The principle is, that a submission is equivalent to a legal demand, in the sense of the statute, before a competent tribunal, within the period; and, therefore, that the limitation of the statute is excluded." His Lordship also held, that the correspondence of the parties "amounted to a departure from the plea on the statute, even if there had been no submission."

624. L. Curriehill observed, as to the effect of a submission upon the running of the statutory limitation of six months, that the party, by entering into the submission, "acquired a conventional right to the remedy of arbitration for trying his claim of damages, and that remedy was not subject to the statutory limitation of six months. Arbitration is a well-known remedy in the practice of Scotland, and the law has attached to it several peculiar privileges, and also several peculiar risks; and, of course, when the parties agreed that that remedy should be adopted in the present case, they respectively acquired these privileges, and exposed themselves to these risks. But the question here is, whether, in addition to the conventional remedy to which the pursuer has acquired right, he not only retained his legal remedy, but further acquired from the defender renunciation of his statutory immunity from such an action beyond the six months; or rather, whether by the submission he created a new and separate right of action, similar to that which had already become extinct." His Lordship added, that the party had failed to establish this, and that there was nothing in the proceedings "implying that the defender discharged his statutory immunity from an action."

625. L. Deas concurred with the L. President, observing that he did not hold it proved that any binding agreement to submit had been made within the six months. "I do not mean to say that an agreement, either expressed or clearly implied, to dispense with the statutory limitation, would be incompetent; but I think it impossible to say there was any such implied agreement here. An express agreement is not alleged. Had a submission been entered into, within the six months, there might have been strong grounds for holding that the statutory limitation stood suspended during the

subsistence of the submission. But there was not even a binding agreement to refer; and the submission itself was not entered into till April 1857."

626. On the whole, it would seem at present to be the safest practical course for any creditor, when a submission is entered into for determining a claim which is liable to be affected by the triennial prescription, or by any statutory limitation, to introduce into the contract of submission an express declaration, that in the event of the submission expiring without an award, it shall still be as free to the pursuer to follow out his claim by action in a Court of law, as it was at the date when the submission was entered into.

627. As the two cases of Dunn and Dudgeon are interesting in this department of the law of arbitration, and as they elicited important judicial opinions, they have both been stated in some detail. It is proper further to remark, that, in the case of Dunn, both L. President M'Neill[1] and L. Rutherfurd[2] intimated, that the effect of a submission in eliding the triennial prescription, and its effect in eliding the sexennial prescription (in the event of the submission falling in either case without an award), would appear to be on the same footing.

CHAPTER IV.

THE REMUNERATION OF THE ARBITER.

628. WHERE an arbiter has not stipulated with the parties for remuneration before he accepted the submission, he has no legal claim to be remunerated. Whatever amount of time, labour, and skill he may have devoted to the service of the parties, in the performance of the trust which they have committed to him, he cannot enforce payment of any fee or recompence in a Court of law, as his office is of a purely honorary character.[3] Undoubtedly, however, the parties contract a moral obligation towards their arbiter, and they cannot withhold payment of a suitable fee, without violating the dictates of equity and good conscience.

[1] 16 D. 950. [2] *Ibid.* 955.

[3] Kennedy, Jan. 20, 1819, F. C.; Paterson, Feb. 19, 1819, F. C., referred to in note to case of Kennedy.

In this respect the law of England seems to be the same. Although authorities somewhat vary, yet it "seems the better opinion, that the appointment of an arbitrator is not of such a nature as to raise an implied promise to pay him a reasonable compensation for his services." His remuneration, "like that of a physician or barrister, is to be left to the option of his employer, and cannot be enforced by action."—Russ. 450, [4th ed., 457].

629. In one case, of special circumstances, where men of an inferior station in life were chosen arbiters, and were required to give much of their time, and also to take much trouble in the line of their ordinary business, in performing their duty as arbiters, the Court, by a majority, sustained their claim for payment of a fee, in recompence of their skill, time, and labour spent in the service of the parties. It was thought, apparently, that neither the parties nor the arbiters could have contemplated that the services of the arbiters were to be gratuitously rendered; and that the contrary had been as fully understood and intended, as if it had been expressly agreed to, in writing, at the outset. But, even in that case, L. President Blair dissented from the judgment, and observed, that "he had always considered that the office of an arbiter was gratuitous, and that action was not competent for a recompence for performing that honourable function." The case was taken to appeal, and so little confidence was felt in the judgment, that the pursuers compromised it before the hearing came on.[1]

630. Since that date, there have been repeated instances, in which the Court have affirmed the doctrine already stated, that an arbiter, whether a professional man or not, has no legal claim for remuneration, unless he has stipulated for it before accepting the office. It was expressly found, by L. Pitmilly, in an interlocutor, to which the Court adhered, that "an action cannot be maintained, at the instance of an arbiter, for payment of his fee, unless in the event of his having stipulated for payment before undertaking the office."[2]

631. But it would appear that, where a stipulation for recompence is made by an arbiter before he accepts his office, he will have a legal claim for payment, which the Court will enforce. "It was in the power of the arbiters, before undertaking their office, legally to make a stipulation for a recompence."[3]

632. In one case, the arbiters, without the support of any previous stipulation, inserted in their award a decerniture for a sum, as due to themselves by way of recompence. There was no indication of corrupt motive on the part of the arbiters, and the decerniture was quite distinct from the rest of the award. In these circumstances, the

[1] MacCallum, etc., June 26, 1810, F. C. [In Henderson *v.* Paul, March 15, 1867, 5 Macph. 628, it was again held that a private arbiter has no right to remuneration, unless he has previously stipulated for it, or unless both parties clearly understood that he was to be remunerated.]

[2] Paterson, *supra*, sec. 628. See also the opinions of the Court, in Fraser, May 26, 1838, 16 S. 1049. The case of Dunlop, 1777, 5 Suppt. 428, appears to have been of a special nature, and to be loosely reported. If it recognised the doctrine that an arbiter could sue for his remuneration without having originally stipulated for it, or could, in any circumstances, fix his own fee, it has long been overruled.

[3] Per L. Pres. Blair, in MacCallum, etc., June 26, 1810, F. C. "There can be no doubt that the arbiters, in such a case, were entitled to a fair remuneration, and also to stipulate for it, before accepting of the submission."—Per L. Moncreiff, in Fraser, July 5, 1834, 12 S. 887.

erroneous portion only of the award was reduced. The Court found, "that the award of the arbiters, ascertaining £12, 12s. as their own fees, was illegal, and *pessimi exempli*, and unwarranted by the submission; and, therefore, sustain the reasons of reduction as to that sum; but find no evidence that the above-mentioned decerniture for their own fees proceeded from any corruption of the arbiters, in the sense of the Regulations 1695, or from any corrupt motive in them; and find that the award of the arbiters, for the above sum, as part of the expenses of the submission, is totally distinct from, and unconnected with, the matters submitted and determined by the decreet-arbitral; and that the decreet-arbitral may and ought to subsist in all its parts, notwithstanding the avoidance of what was so illegally awarded; and, therefore, repel the reasons of reduction of the decreet-arbitral, *quoad ultra*, and decern; and find no expenses due to either party." [1]

633. Where no stipulation has been made originally for the remuneration of the arbiters, and, pending the submission, they make any approach towards bargaining or chaffering with the parties on the subject of their remuneration, it is regarded with the utmost jealousy by the Court. No such proceeding can even be commenced, without exposing any subsequent award to the greatest hazard. The difference between stipulating for remuneration before accepting the office of arbiter, and after acceptance, has been said, in pleading, to be clear upon this footing, that "in the one case the parties are not in the power of the arbiters, while in the other they are." [2]

634. In the case of Blair, the Court reduced an award on the ground of corruption, because the arbiters refused to give out their award until they got payment of the fee demanded by them; which one party refused, but the other agreed to give. The Court also ordained the arbiters to pay back the fee for behoof of the poor. The case is very shortly reported; but, in Fraser, May 26, 1838, 16 S. 1055, L. J. Clerk Boyle had occasion to observe, that, "however succinct the report in Elchies may be, the Court was satisfied that the conduct of the arbiters was tainted with corruption." The Session Papers in this case appear not to be complete.[3]

635. Even where arbiters act with perfect openness and equality towards both parties, in demanding from them, pending the submission, a written obligation to recompense them for their services, yet if no stipulation, either verbal or written, has been made on the subject before the arbitral office was accepted, it has been said to be doubtful whether such procedure must not be held to be illegal; and

[1] Jack, March 6, 1777 (Dicty. Arbn., Appendix No. 5). See also Montgomerie, June 13, 1798, F. C. The case of Lyle, Dec. 2, 1842, 5 D. 236, appears to be entirely special, so far as regards this point.

[2] Fraser, May 26, 1838, 16 S. 1053.

[3] Blair, Jan. 12, 1738, Elch. Arbn. 3.

if actually illegal, whether a party could be barred[1] by personal exception from objecting to it.

636. But if, before the arbiters accepted, there was a distinct agreement and understanding with them, though merely verbal, that they should receive remuneration, it would appear that their subsequently insisting, pending the submission, that this agreement should be reduced to writing, will not imply "corruption" on their part, or expose their award to reduction.[2]

637. An action was raised by one of the parties to a pending submission, setting forth that, at an advanced stage of the submission, the arbiters had refused to issue their notes of opinion, unless the parties came under an obligation to pay them a suitable remuneration for their time and trouble as arbiters, and had thereby compelled the parties to execute such an obligation. The action concluded for declarator that the arbiters had thereby acted illegally and corruptly; that they were disqualified from further acting as arbiters, so that the submission had fallen and become inoperative; and that the arbiters should be interdicted from further procedure under the submission. The chief ground of the successful defence of the arbiters' procedure, was the plea that there had been a prior agreement by the parties to grant the obligation in question; that this agreement would have been unchallengeable, if granted before the arbiters accepted their office, and it was substantially on the same footing in this case, because it was granted at an early stage of the submission, and before even the claims and productions had been lodged; and that, although the said prior agreement had been allowed to lie over, unexecuted for more than a year, while the submission was going on, it nevertheless existed all along; insomuch that the written obligation, ultimately granted, was not in virtue of any new agreement, but was merely the written evidence of an agreement which drew back to the outset of the submission.

638. On the facts, stated by the defenders, being found by a special verdict, the Court unanimously held that the arbiters had not acted wrongfully and corruptly in taking the foresaid obligation. The defenders were accordingly assoilzied.[2] It may be noticed, that, pending the declarator, the submission had been brought to a conclusion by an award, in which the arbiters had not decerned for any remuneration to themselves.

[1] See opinion of L. Moncreiff, in Fraser, July 5, 1834, 12 S. 887. His Lordship, after adverting to the importance of the allegation, that a verbal agreement for remuneration had been actually made before the office of arbiter was accepted, observed: "2d, If that fact were not established, there is a material difference between what may be agreed on between the parties, and what may be legally demanded by the arbiters, in the middle of an arbitration; and 3d, If the proceeding were held to be illegal, it would be difficult to hold that the proceedings were validated by the party having complied with the demand, or not having objected to it."

[2] Fraser, *supra*; and also, May 26, 1838, 16 S. 1049.

639. In the case of Baillie, a professional man being named oversman, and soon perceiving that it would require much time and labour to perform the duty adequately, intimated to the parties, at an early stage, that he had accepted the office on the distinct understanding of being remunerated for his trouble, and that he required a written agreement from them, to pay him a reasonable remuneration. Both parties signed such an agreement. He then proceeded and ultimately issued an award, on which diligence was raised, which was brought under suspension upon other grounds. One of the Judges having drawn the attention of the Court to the agreement for the oversman's remuneration, a majority of the Judges agreed with L. President Hope, in holding that it did not affect the validity of the award, "as the arbiter had not decerned for anything to himself."

640. Although there has been an express agreement to allow remuneration to the arbiter, duly made before he accepted his office, it does not rest with the arbiter himself to fix the amount of his own fee, and decern for it. In the case of Fraser,[1] it was provided that, if the parties and the arbiters did not agree as to the amount of remuneration which was due, that matter should be remitted to the determination of the Solicitor-General for the time being. In the case of Baxter,[2] which was a judicial reference, the referee merely decided which party was liable for such fee as the Court might hold him entitled to receive; and the Court, when interponing their authority to his award, remitted to the Auditor to fix the amount of the fee.

641. In the case of a judicial reference, where expenses have been awarded to neither party, it has been repeatedly held, that where one of the parties pays a fee to the referee, which is not objectionable in point of amount, he may claim relief against the other party to the extent of one-half.[3] And where a judicial referee, who found one of the parties generally liable in expenses, had made no special finding in regard to his own fee (being restrained by motives of delicacy from doing so), the successful party, after having paid a fee to the referee, moved the Court, at interponing their authority to the award, to decern in his favour for relief of the whole of the fee. No objection was

[1] *Supra*, sec. 636.

[2] June 1, 1838, 16 S. 1085.

[3] Edinr. Oil Gas Co., Feb. 6, 1835, 13 S. 413. This claim is generally disposed of in the action in which the reference is made, and should always be so. But in this case it was made in a subsequent action, which was raised mainly to enforce implement of the referee's award. L. Corehouse, Ordinary, observed in a note: "No objection is made to the fee, paid by the pursuers to the arbiter, on the ground that it was exorbitant and unreasonable. There can be no doubt, therefore, that the defenders are liable in one-half of it." His Lordship, also, in the circumstances, repelled the objection that this sum "should have been claimed as a part of the expenses" of the original action. On a reclaiming Note, the Court unanimously adhered.

On appeal, the judgment in the original action was altered; but upon grounds which did not affect the views of the Court above mentioned.

made to the fee in point of amount, but the motion was resisted as incompetent. The Court unanimously gave decree for relief of the whole fee.[1]

642. It has been stated from the bench, that though there is no legal obligation on the parties to pay a fee to an arbiter in an ordinary submission, yet there is a moral obligation to do so; and that if one of the parties, in fulfilment of this moral obligation, pays a fee to an arbiter, which is not excessive in amount, he will have a legal claim against the other party for relief to the extent of one-half.[2]

643. There is at least one case of an extra-judicial or ordinary submission, in which the party, who had paid an account including a fee to the arbiters, was found entitled to a decree against the other party to relieve him of one-half of the account. The report of the case, no doubt, bears that L. President Hope made an observation to the effect that, as it was a reference to professional engineers, who required, *inter alia*, to visit and inspect premises, his Lordship did not regard the question of their remuneration as being on the same footing as if it had arisen under "a proper arbitration in the purest form." But perhaps it may be permitted to remark, that L. Corehouse, who decided the case as L. Ordinary, did not indicate that he had any such distinction in his view; that there would be great difficulty in defining the limits of such a distinction, if it were admitted; and that none of the Judges of the Inner House, except the L. President, appears to have specially adverted to it.[3]

644. In connection with this subject, it seems deserving of notice, that, as lately as the case of Napier, Nov. 20, 1746 (5729), the Court held that their own commissioner, who had taken a proof in a cause depending before them, was not entitled to a fee, but that his clerk was so. They did this on the footing, that the case of a commissioner

[1] Yates, June 7, 1848, 10 D. 1233. See also Drummond, Mar. 11, 1835, 13 S. 684, in which the Court decerned, in similar circumstances, for relief of one-half of the fee, being all that was asked. L. J. Clerk Boyle then observed, that "the judicial referee is an officer of the Court." This makes a material distinction between his position, and that of an arbiter under a private submission.

[2] "Though remuneration be not stipulated, if one of the parties acknowledge his liability therefor, which is a moral, though not a legal obligation, and pays what is reasonable, he can recover the half from the other party."—Per L. Medwyn, in Fraser, May 26, 1838, 16 S. 1049. It is true that, in this case, the arbiter's remuneration in certain judicial references was included; but there was also included their remuneration in an ordinary submission to them; and on the bench it was observed, "that the submission absorbed the judicial references which are expressly narrated in it."—Per L. J. Clerk Boyle, *ibid.*, p. 1055. It seems material to advert to the precise state of the fact as to this; because the honorary of an arbiter does not rest on the same footing with the remuneration of a judicial referee, who is an officer of the Court. But the doctrine above quoted appears to have been delivered in terms which were applicable to an ordinary submission. [See, however, Henderson *v.* Paul, March 15, 1867, 5 Macph. 628, in which the above *dictum* of Lord Medwyn was repudiated.]

[3] Jolly, Dec. 12, 1834, 13 S. 188.

resembled that of an arbiter. Kilkerran, in his report, observes: "A question arose, whether or not commissioners were entitled to any fee or reward? and it was agreed that they were not, as what might be *mali exempli*, should they, on whom the wording of the testimonies depends, be allowed to take money from either party. And the case of arbiters was remembered, wherein, though it be the practice to club for paying arbiters, yet, when the case came to be determined, whether, *de jure*, arbiters were entitled to any reward, the Lords found that they were not. But as to the clerk to the commission, it was agreed that he was entitled to a gratuity; and it was remitted to the Lord Ordinary to tax the same, to be paid by the defender whose proof it was." Although it remains as well fixed now as it was then, that an arbiter has no legal claim which he can enforce for his own remuneration, yet perhaps the change which has taken place in the views of the Court, respecting the remuneration of a commissioner who leads a proof, may indirectly lend some support to the equitable plea above noticed, that a party who fulfils the moral obligation of paying a suitable fee to an arbiter, will have an effectual claim of relief against the other party to the submission.

645. In concluding this subject, the practical observation may be made, that it perhaps deserves consideration, whether the parties should not make it a matter of express and spontaneous agreement between themselves, that the arbiter shall receive suitable remuneration before they ask him to accept of the office. If they mutually bound themselves in relief, to the extent of one-half of any suitable fee which either of them might pay to the arbiter, this would sometimes be found a useful obligation at the close of a submission. In cases where a considerable demand is to be made upon the time and skill of an arbiter, such an arrangement between the parties would seem to be a reasonable course in itself to follow, and perfectly becoming towards the arbiter, whether they informed him of the existence of their agreement, or not. At the close of the submission, it is probable that one, at least, of the parties is dissatisfied with the award. From this, or other causes, it does occasionally happen, that parties permit themselves to evade the just and honourable obligation of recompence, which they have, both and each, contracted towards their arbiter. On this subject, L. President Blair observed, respecting the practice of his own day: "Innumerable arbitrations had been, in former times, and were daily submitted to gentlemen of the Bar, who exercised their profession for gain; and it must consist with the personal experience of many of the Judges, while at the Bar, as well as with that of present practitioners, that in these arbitrations the fee was frequently withheld, although as fully expected, and although the skill and labour of the arbiter were as purely and exclusively professional, as in the present instance. In

all these cases, no action had ever been pursued before the Court," etc. "The general rule being so distinct and well established, it was in the power of the parties to avoid its operation, by expressly stipulating the amount of their recompence before accepting of the submission."[1]

CHAPTER V.

EFFECT OF HOMOLOGATION ON ARBITRATION-PROCEDURE.

646. THE law of arbitration is, in so great measure, contract-law, that the equitable and useful doctrine of homologation has an important practical effect on many departments of its procedure. As all contract-obligation is based upon the mutual consent of parties, it follows that acts of homologation (that is, of "*assent*, express, or inferred from circumstances"[2]) have often been allowed the greatest weight in disposing of objections, raised by a party-submitter, to any of the proceedings under a submission. The application of the doctrine of homologation has, accordingly, been acknowledged from a very early period.[3]

647. In order that an act of alleged homologation affecting arbitration-procedure may afford unequivocal evidence of a party's true consent to that which he is said to homologate, it is requisite that the act be done by the party with that freedom of will, and that knowledge of all relative essential circumstances, which are necessary to give the legal force of genuine homologation to an act performed by a party in any of the other affairs of life. If, therefore, he acted under constraint, or in a state of ignorance, the act will not infer homologation against him.[4]

648. There are few if any defects in the formal procedure under a submission, which may not be cured by homologation. Defects in the deed of submission,—in the arbiter's omission to execute his

[1] MacCallum, June 26, 1810, F. C. Apparently, the concluding observation only referred to stipulating for "a suitable recompence;" as the "amount" of it must be contingent upon many circumstances which could not be foreseen at the threshold of the submission. To provide against the event of a disagreement regarding the amount of the fee to be paid, some person should be named to decide on this matter, alone and without appeal. Such a course was followed in the case of Fraser, *supra*, sec. 636. An agreement, as above suggested, between the parties-submitters, would go far to place this matter on a proper footing.

[2] 1 St. 10. 11; 3 Erak. 3. 47; Bell's Pr., sec. 27.

[3] L. of Ruthven, July 31, 1560 (5619); Montgomery, Feb. 23, 1566 (5619); Balf. Pr. Arb. 416, c. 30.

[4] Maxwell, Feb. 13, 1679, 2 Suppt. 243; Grant, Dec. 9, 1679, 2 Suppt. 253. [Thomson's Trs. *v.* Muir, Dec. 13, 1867, 6 Macph. 145.]

acceptance of office,—in the prorogation of the submission,—in the omission of the interlocutor interponing the authority of the Court to a judicial reference,—in the mode of conducting a proof,—and, finally, in the award itself,—have severally furnished instances in which acts of homologation have validated irregular procedure, or barred the parties personally from bringing it under challenge.

649. Thus, although a deed of submission is not binding *per se*, unless it be executed with the solemnities of a probative writ, yet improbative submissions become valid and binding in all respects, by the parties appearing and pleading before the arbiter.[1] This seems a modified illustration of the well-known rule in regard to such jurisdiction of public Courts, as admits of "tacit prorogation" by a party; "primus actus judicii, est judicis approbatorius."

650. When an arbiter omitted to sign any acceptance of the submission at all, this important defect was held to be cured by the parties appearing and pleading before him, and obtempering orders made by him in the character of arbiter. Such actings evinced, as undeniably as a signed minute of express acceptance could have done, that the arbiter had, *de facto*, taken upon himself the office of arbitration under the submission, and that the parties recognised him as being clothed with that office.[2]

651. In another case, in a judicial reference, the interlocutor of the Court interponing its authority to the reference was by oversight omitted. As that interlocutor lies at the foundation of the judicial character of the proceeding, it is, in practice, invariably adhibited, *in limine*, and before any steps are taken under the reference. Nevertheless, it was found that acts of homologation by the parties were sufficient to validate the procedure which took place before the judicial referee; or at least to bar either party, by personal exception, from founding an objection upon the absence of the interlocutor in question. Both parties had, as usual, signed a minute agreeing to the reference; and both had pleaded and led proof before the referee. It was only after an award was given, that one of the parties betook himself to the objection, that no interlocutor had been pronounced at the outset, remitting the process to the referee, and interponing the authority of the Court to the reference. The Court unanimously repelled the objection; "the want of an interlocutor, or the signature

[1] Taylor, Nov. 25, 1800, F. C.; Brown, Jan. 10, 1739 (5659); Telfer, Jan. 21, 1735 (5657 and 17032); Wallace, Feb. 20, 1830, 8 S. 572; Montgomerie, June 23, 1848, 10 D. 1387. See also Johnston, July 10, 1817, 5 Dow, 264. [Elgin Lunacy Board, note 3, p. 45.]

[2] Gardner, Jan. 19, 1773 (659). It would appear that, in England, where an umpire had been appointed by arbitrators who had not received authority to do so, and where the umpire, moreover, had examined the parties in an irregular manner, the parties, by subsequently pleading before him, were held to have waived all objection.—Russ. 195, [4th ed., 186].

of the Court to the reference, being of no consequence, as it was homologated by the appearance of the parties before the referee."[1]

652. In a reduction of an award, the pursuer alleged that it was founded in falsehood; for although, *ex facie* of the proceedings, the witnesses were set forth as having been sworn, they had not, in fact, been so; and thus no evidence, properly so called, had been obtained from them. It appeared, however, that the pursuer, though aware of the facts, had taken no objection until after the award was pronounced. He thus had been truly a consenting party to the procedure of which he now complained; it was competent to him to consent that the witnesses should be examined on declaration, and not upon oath; and, in point of fact, he was held to have done so. The Court, accordingly, sustained the award.[2] This decision, it may be observed, does not at all indicate that it can ever be a correct or justifiable proceeding on the part of an arbiter, to state on the record of the submission that witnesses had been sworn, when this is contrary to the fact. But it was not in the mouth of the pursuer to complain of this statement, after having himself been a party to the whole *res gesta*.

653. Even in a case where one of the parties-submitters, besides naming his own referee, had surreptitiously introduced into the submission the name of the other referee, also selected by himself, and thereafter had obtained an award, on which he raised an action, the Court thought it right, by their interlocutor, emphatically to mark that the defender had neither originally consented to the selection of the second referee, nor subsequently homologated it. The defender was assoilzied from the action, "in respect he did not approve of the appointment of Mr. Boyd as one of the referees, or homologate his actings as one of the referees."[3]

654. Where an arbiter has committed the error of leading evidence in the absence of the parties, and without giving them notice to attend, it is in their power, if they please, to waive all objection thence arising, if they see cause. They may do this, not only by express written consent to waive objection, but also by such acts of homologation as afford unequivocal evidence of the same consent.[4]

[1] Per L. Medwyn, in Fairley, Feb. 11, 1836, 14 S. 470. It may be observed, that the facts also raised a plea of *rei interventus*, inasmuch as the reference had been agreed to in Court, on the morning when a trial by jury was about to commence, and the jury were discharged on the faith of the reference being proceeded with.

In a previous case, it would appear that a similar objection had been held to have been obviated by homologation.—Laurie, June 14, 1814; Excerpt from L. J. Clerk's Note-book in Parker's Syn., xxvi. 85.

[2] Stewart, Feb. 21, 1822, 1 S. 313. See also Cochrane, Mar. 30, 1861, 33 S. J. 430.

[3] Deas, May 25, 1821, 1 S. 29.

[4] See observations by L. Cranworth, C., to this effect, in Drew, Mar. 8, 1855, 2 Macq. 10. See also, in connection with the subject of homologation, the case of Scoullar, April 19, 1804, noticed in the Session Papers in Percy, Nov. 25, 1808,

Wherever they have so acted, they are effectually barred personally from afterwards recurring to the objection.

655. There is one question in connection with this subject which has given rise to much discussion, and on which it would rather appear that all the reported cases are not reconcileable with each other. It is of the essence of an act of homologation, that it be performed by a party, then in the knowledge of those circumstances which were calculated materially to affect him, in determining whether he would or would not ratify that which was otherwise invalid. Because, unless the party possesses such knowledge, his acts, done in ignorance, do not afford evidence of that *true consent* which is the basis of the plea of homologation.

656. Where an arbiter has accidentally failed to execute a timeful prorogation, the necessary effect is that the submission falls; and as the arbiter is thus rendered *functus*, the submission cannot be continued by any unaided act of his, without the concurrence of the parties consenting to its continuance. But such consent the parties may give, either expressly in writing, or by acts of homologation, which unequivocally evince their assent to the continuance of the submission, notwithstanding the lapse which has occurred.[1]

657. Wherever, therefore, the parties (being in the knowledge of the arbiter's failure to make a timeful prorogation) shall neverthe-

F. C., where it is stated that a party who had registered an award, and given a charge upon it, was held barred thereby from afterwards setting it aside on the ground of informality.

[1] The same strong effect is given to homologation in England. By the Common Law Procedure Act, 17 and 18 Vict. c. 125, sec. 15, it is provided that the arbitrator, in the references there mentioned, shall make his award within three months, after he shall have been appointed, etc., "but the parties may, by consent in writing, enlarge the term for making the award;" or the Court may do so, as there provided. In connection with this provision, "where a cause was referred to an officer of the Court, under the compulsory powers of 17 and 18 Vict. c. 125, and the award was not made within three months, and the time was not enlarged by the Court, or a Judge, or the written consent of the parties, as required by sec. 15, but they continued to attend before the arbitrator after the expiration of the three months without objection; it was held that the party against whom judgment had been signed upon the award, was estopped from alleging that there had been no written consent to the enlargement." Per Erle, J.—"The arbitrator had power to proceed for three months, and for any further time, by the written consent of the parties. There are no prohibiting words, which prevent his going on without such consent. Here there has been no such consent; but both parties, after the lapse of the three months, act as if such consent had been given, and as if the arbiter had full authority to proceed. It seems to me, therefore, that both are precluded from saying that he had no authority. Pickard *v.* Sears lays down the rule, that a party, who, by his conduct, induces another to believe in, and to act upon, a certain state of facts, is precluded from denying that such a state of facts existed. Here the plaintiff held out to the defendant that there was a valid consent, and the defendant and the master acted upon that assumption."—Tyerman, June 5, 1856, 25 L. J. 359, Q. B. See also Russ. 195, [4th ed., 186].

less appear and plead before the arbiter, and obtemper his orders, they clearly homologate the continuance of the submission, and cure the objection which might otherwise have been taken to the want of a legal prorogation.[1] But where a party, pursuing the reduction of an award on the ground of defective prorogation, denied that he knew, pending the submission, of any defect having occurred in the prorogations, and therefore pleaded that no acts of his, which were done in ignorance of that essential fact, could be founded on as acts of genuine homologation, a case was presented, as to which the decisions scarcely, perhaps, appear to be at one with each other.

658. On the one hand, the pursuer of the reduction has pleaded that, as an act of prorogation was exclusively the arbiter's own act,—done *proprio motu*, and without notice to the parties—it was an act respecting the particulars of which they were in no degree cognisant. If a defect existed in the solemnities of the contract of submission, that might indeed be cured by pleading before the arbiter, because that was the deed of the parties themselves: its defective state was known to them both; and if, in that knowledge, they appeared and pleaded before the arbiter, they were justly held to have homologated the submission. But it was otherwise with an act of prorogation, to which they were not at all privy. As to the existence of timefully renewed prorogations throughout the whole submission, the parties were entitled to presume, and did presume, that such was the fact, and that the arbiter was acting regularly in this respect, as well as all others. But, if so, they never knew that the case had occurred, in which it was free to them to decline to carry on the submission if they pleased. And, therefore, being in ignorance of this fundamental point, any acts of theirs, in appearing and pleading before the arbiter, under the belief that they were bound to do so, could not justly be founded on as acts of homologation. Such acts could not afford evidence of their consent to waive a fatal objection, of the very existence of which they were not aware.

659. On the other hand, the defender in the reduction has answered that, although an arbiter had power, *proprio motu*, to execute all timeful prorogations without notice to the parties, and it was the common practice to do so, yet it was certain, as matter of fact, that an oversight in this particular might occur in any submission. And it was always in the power of either party, who wished to certiorate himself on the vital subject, whether the submission was still regularly kept up, to require a sight of the prorogations executed by the arbiter. No arbiter was entitled to refuse such a request. But, if so, it rested with a party himself to obtain full and accurate knowledge of the existing state of the submission, at any time when he thought proper to do so. In fact, he could scarcely fail to have frequent opportuni-

[1] [Paul *v.* Henderson, March 15, 1867, 5 Macph. 613.]

ties, incidentally, of looking into the process, and certiorating himself, without making any formal application to the arbiter upon the subject. But he must, at all events, be presumed to have known the actual state of the prorogations throughout, seeing that it was always within his own power to do so, and, moreover, was part of his own duty. But, if so, he could not be allowed, either through neglect or design, to shut his eyes to this matter during the whole procedure, reserving all the while a contingent objection, to be stated at the close of the submission, in the event of an award being pronounced which disappointed his expectations. By adopting the simple rule, that the parties knew, or were presumed to know, the state of the prorogations throughout, the salutary doctrine of homologation could justly be applied to their acts; and its application would be of great practical importance, in subserving the ends of justice.

660. These latter views, in favour of giving free scope to the doctrine of homologation, in its application to this subject, appear to have repeatedly received authoritative support from the Court. When the defender, in a reduction of an award, pleaded that the parties, by their "appearances and arguings before the arbiter," had cured a defect in the prorogation of the submission, the pursuer answered "that it did not appear he (pursuer) knew of the nullity, without which there could be no homologation." Kilkerran reports that, "as to this, Arniston was of opinion that his knowledge was presumed; that he must have known there was a prorogation, the term of the submission being elapsed, and therefore was presumed to know the tenor and contents of it; and nobody was of a different opinion." A unanimous interlocutor was pronounced, by which the Court "found the homologation of the prorogation relevant and proven," etc.[1]

661. In another and a recent case, in which a submission had lasted, without any prorogation, for several years, before an award was pronounced, a reduction was raised, *inter alia*, in respect that the submission had fallen from the want of prorogation. The defender pleaded that the pursuer had homologated the continuance of the submission, by appearing and pleading before the arbiters and overs-

[1] Macilhose, July 13, 1738, reported by Kilkerran, 5 Suppt. 204.

At the date of this case, it had not yet been settled that a prorogation did not require to be a probative writ; and the L. Ordinary had found, by an interlocutor which was allowed to become final, that the prorogation "was null, as wanting the writer's name." His Lordship, at the same time, allowed a proof of alleged acts of homologation, to cure the defect in the prorogation. It was in these circumstances that the question noticed in the text arose.

In the appellant's case, in Colquhoun, July 26, 1784, 2 Pat. 626, it is stated, *narrative*, that after the award had been reduced, in Wight, Jan. 20, 1780, as reported in the Faculty Collection, on account of an informal minute of devolution, the interlocutor was altered, and the award sustained, in respect the pursuer had pleaded before the oversman, and so had homologated the devolution.

man; he also pleaded, separately, that the submission, from its own style and tenor, subsisted throughout, without requiring any act of prorogation to continue it. With respect to the plea of homologation, the pursuer maintained (as in the case of Macilhose), that, when he performed the acts of alleged homologation, he was in ignorance of the submission having lapsed, and therefore such acts were no true evidence of homologation. The defender made answers similar to those already noticed. The L. Ordinary, Eldin, reduced the award, and found "that the submission in question contained no power of prorogation, and that it expired in a year and day from its date; that, after the expiry of a year and day, the arbiters differed in opinion, and thereupon appointed an oversman, who took various steps in the submission, as if it had not expired; that there are no grounds to believe that either the arbiters or the parties knew that the submission had so expired; and, in particular, finds no evidence whatever that the pursuer knew that he was no longer bound by the submission, or consented to homologate the same." The defender reclaimed, and the opinions of the whole Court were taken on both of the points above mentioned. Three of the Judges held that there could be no homologation inferred from the pursuer's conduct, "unless it could be made out that he was aware that the submission did expire by the lapse of the year."[1] Two of the Judges refrained from expressing an opinion on this point, as they considered it unnecessary, seeing that they held the submission, from its own tenor, to require no prorogation to keep it up.[2] The eight remaining Judges concurred in holding that the "conduct of both parties, in continuing to plead and lead proof before the arbiters and oversman, long after the lapse of a year from the date of the letter of reference, does amount to complete homologation of their proceedings; or rather, to speak more correctly, does amount to a prorogation of the time for pronouncing decreet-arbitral, and consequently that neither party can object to the decreet so pronounced."[3]

662. A large majority of the Court further held that the submission in Fleming's case was so expressed as to subsist continuously, without requiring the aid of any prorogation. This superseded any express judgment on the question of homologation. Nevertheless, as the above deliberate opinions on that point were given, it would appear that these, when taken in connection with the case of Macilhose, afford strong authority for holding that parties who continue to appear and plead before an arbiter, and to obtemper his orders, pending a submission, are held to have thereby homologated his proceedings, or to have

[1] L. J. Clerk Boyle, L. Pitmilly, and L. Eldin. L. Robertson, who was on the bench at the first advising of the case, then expressed also a similar opinion.

[2] L. Cringletie and Medwyn.

[3] Fleming, July 7, 1827, 5 S. 841. [Paul v. Henderson, note, p. 323.]

prorogated the time for pronouncing the award, although no proof be adduced that they then actually knew of the want of due prorogation by the arbiter. The result of this would be, that, after the award shall have been pronounced, parties who had continued to plead before the arbiter are thus effectually barred from taking an objection, that the submission had not been duly kept up by timeful prorogation. Such a doctrine seems evidently equitable and salutary in its operation. Either party has, at all times, the means of knowing the state of the prorogations, if he chooses to make due inquiry. He knows at what time a new prorogation ought to be made. And, if he chooses, without inquiry, to proceed on the assumption that the submission has been duly kept up, and to plead before the arbiter accordingly, thereby taking his chance of getting a good award, he ought not to be allowed to reserve at the same time, in his own breast, the power of ultimately objecting to the award, in the event of his finding it less favourable than he had expected.[1]

663. Where one of several parties-submitters had omitted to sign the deed of submission, but had acted along with the others as a party-submitter, appearing and leading proof before the arbiter, he has been held bound by the submission, though he had not signed it, and the submission related to heritable subjects. Accordingly, where another of the parties-submitters, who had himself signed the submission, brought a suspension of the award, on the ground that the first party (Colvill) was free of the contract, as he had never signed it, and, by consequence, that all the other parties were likewise free (as the contract of submission must be binding on all or none), the Court held that Colvill, had he himself brought a suspension, would have been effectually bound as a party-submitter by his acts and deeds, and therefore that the alleged ground of suspension had no foundation.[2]

664. It may be noticed here, in connection with the present subject, that the assent which is held to be proved by the actings of parties under a submission, may often have the effect, not only of homologating the submission, but also of putting a special interpretation upon its terms, so as to remove any doubts which might other-

[1] See note 184, Ivory's Ersk. 4. 3. 32. It should be noticed, at the same time, that there are two modern cases, in which the plea of homologation, founded on the pleadings of parties before the arbiters and overseman, was earnestly, but unsuccessfully, urged upon the Court. In the last case particularly, the acts of homologation were strong and reiterated. This appears from the Session Papers, though not from the reports. But both cases occurred prior to Fleming's case, and were founded upon in that case, so that their authority on this point may be held to be overruled. They are reported without any reference being made to the plea of homologation. The cases are—Thomson, Jan. 28, 1818, F. C.; and Stark, Dec. 23, 1820, F. C., Appx. 3.

[2] Brown, Jan. 10, 1739 (5659). See also Johnston, July 10, 1817, 5 Dow 247, noticed *supra*, sec. 588.

wise have existed on the subject. For example, when an objection was taken, that a submission had fallen in consequence of the death of one of the original parties, a question arose, whether the terms of the submission imported a contract which was to be binding, notwithstanding the death of a party. The Court, in disposing of this question, and arriving at the conclusion that the submission had not fallen, took into view the actings of the parties, as affording proof "of the construction practically put upon the clause by the parties, including the pursuer himself."[1]

665. In another case, where a question arose, whether a minute of submission was to be held to confer a power of prorogation, the Court expressly relied much on the actings of the parties, as affording evidence of their mutual understanding that their contract did contain this power. The minute was consequent on previous procedure, to which it was expletive or ancillary. L. President M'Neill observed that, "although there is no express power of prorogation, I think it (the minute) is to be construed by the conduct of the parties." All the other Judges expressed similar views.[2]

666. In a purely statutory submission, however, there are deviations from the procedure enjoined by statute, which the actings of the parties and the arbiters will not cure.[3] But the plea of homologation may be available when the submission is of a mixed complexion, being an ordinary submission, upon which the parties have engrafted a certain portion of the statutory provisions.[4]

667. Where the homologation of an award is coupled with acts of *rei interventus* of an important character, the right of challenge of an award is still more strongly barred.[5]

CHAPTER VI.

GROUNDS OF CHALLENGE OF AN AWARD.

668. THE grounds of challenge of an award may be divided into two classes,—those founded on the Act of Regulations 1695, and those

[1] Per L. Deas, in delivering the judgment of the Court, in Orrell, Feb. 22, 1859, 21 D. 554.

[2] Gowans, Feb. 3, 1859, 21 D. 403. See also N. Br. Ry. Co., Nov. 27, 1855, 18 D. 102, in which the actings of the parties were much relied upon as proving that they had enlarged the scope of a submission beyond its original basis, or at least as barring them personally from resorting to the plea of *ultra vires*.

[3] Glasgow, B., and N. Ry. Co., August 5, 1850, 7 Bell's App. 325. See *infra*, CH. XIII. Statutory Arbitration.

[4] Dundee, P., and A. Ry. Co., Jan. 31, 1851, 13 D. 552. See also Caled. Ry. Co., Feb. 25, 1857, 19 D. 527, affd. Mar. 23, 1860, 32 S. J. 472, and 22 D. 8, Appx. Appeal Cases.

[5] Forbes, Feb. 5, 1830, 8 S. 459.

founded on the common law. A statement of these grounds of challenge has necessarily been already made, to a large extent by anticipation, in various preceding chapters, when considering the contract of submission, the Act of Regulations, the powers and duties of arbiters, and the award. The present chapter will, therefore, enumerate, only very concisely, the chief grounds of reduction of an award; but making a rather fuller explanation as to some of those which have been hitherto more briefly noticed.

669. The grounds of reduction of an award, under the Act of Regulations, where there has been a "subscribed submission," are "corruption, bribery, or falsehood;" the same being "alleged against the judges-arbitrators," who pronounced the award.

670. With regard to the scope and meaning of the term "corruption," as used in the Act, the authorities have already been quoted so fully [1] as to preclude repetition here. It may apparently be stated, as the general result deducible from the cases, that if an arbiter misconducts himself in carrying on the submission, so as to commit any violation of essential duty to the parties, which is distinct from mere error of judgment, and which involves manifest injustice, he will be open to the charge of "constructive corruption" under the Act of Regulations, though he may be entirely free of all moral depravity.[2]

671. The next ground of reduction mentioned in the Act of Regulations, is that of "bribery" alleged against the arbiter. This term, as there used, does not appear to have received from the Court any constructive signification, different from its plain and ordinary meaning. Any gift, favour, or gratuitous promise of benefit, in short, any reward or consideration, accepted by an arbiter from (or on behalf of) a party-submitter, as an inducement to exercise his arbitral powers with partial bias towards that party's interests, would involve the arbiter in the guilt of being the recipient of a bribe, and lay his award open to reduction on the Act of Regulations. It would lay the award open to reduction, also, at common law, as the obligation which the other party undertook, to implement the award, could not, by any rational construction, be held to apply to an award fraudulently procured by his opponent by means of bribing the arbiter.

672. The cases are comparatively few, in which actual bribery has been seriously alleged against an arbiter. But as an arbiter possesses great powers, which are only bestowed in consequence of the high trust of his office, and as his award is so strongly fortified by law, the

[1] *Supra*, sec. 43 *et seq.*

[2] Where the "corruption" of the arbiter was not merely constructive, but actual and gross, the Court, besides reducing the award, have summarily visited the arbiter with censure and punishment. This took the shape of fine and imprisonment in the case of Dalgliesh, etc., Jan. 29, 1742 (Books of Council and Session), where the arbiters, Johnston and others, were held to be "guilty of gross and notorious fraud."

Court have been, in a proportional degree, sensitively alive to any charge of bribery brought against him, whenever there seemed grounds for probable suspicion; and sometimes even when such suspicion could only be rested on a rigorous view of his conduct and motives.[1]

673. In one case, a bill of suspension of a charge upon an award, was presented on the ground of the arbiter having gratuitously accepted an assignation of "a great many debts" due to one of the parties, who, moreover, was his son-in-law. The Court ordained the charger, before answer, to prove the adequate onerous cause of the assignation. This was unsuccessfully attempted, and the Court found "that the arbiter could not warrantably accept of any assignation, gratuitous in whole or in part, during the currency of the submission." The report does not give the final disposal of the suspension, but, from its tenor, it would appear that the reasons of suspension, if founded in fact, were held conclusive in law.

674. In another case,[2] where arbiters, after they had signed their award, refused to deliver it up, "until they were paid for their labour and pains;" and one of the parties paid the sum demanded, and got up the award; the Court found that the award was obtained by bribery and corruption, and reduced it *in toto;* at the same time ordaining the arbiters to repeat the fee which had been paid to them. If it were the fact that the award had been actually completed and signed before even a hint was given by the arbiters to either party on the subject of their fee; and if the fee actually paid was only a suitable remuneration for their services, the step of reducing the award would seem to be a severe measure towards the party in whose favour it had been pronounced, before any discussion regarding the fee arose. But the report of the case is brief; and in adverting to it recently, L. President Boyle took occasion to observe, that "however succinct the report in Elchies may be, the Court was satisfied that the conduct of the arbiters was tainted with actual corruption."[3]

675. In a subsequent case,[4] where the arbiters had decerned for a fee to themselves in their award, the Court, being satisfied that this was not done from any corrupt motive, merely reduced the award *quoad hoc*, and sustained it otherwise. But the report shows how nearly, in this instance also, the whole award had been reduced,—an interlocutor having at one time been pronounced, reducing it, in respect that the arbiters' decerniture for a fee to themselves was "illegal and corrupt."

[1] Mitchell, Jan. 14, 1715 (663).

[2] Blair, Jan. 12, 1738 (664).

[3] Fraser, May 26, 1838, 16 S. 1055.

[4] Jack, Mar. 6, 1777 (Dicty. Arbn., Appx. 5). See also Montgomery, June 13, 1798 (631); Stewart, Feb. 21, 1822, 1 S. 313; Elliot, Dec. 15, 1789 (668); Mackenzie, Dec. 19, 1828, 7 S. 215; Mackessock, Nov. 14, 1822, 2 S. 11; and discussion in Fraser, May 26, 1838, 16 S. 1049. [Cox Bros. *v.* Binning, Dec. 18, 1867, 6 Macph. 161.]

676. The last ground of reduction specified in the Act of Regulations, is that of "falsehood" alleged against the arbiter. With respect to the scope and application of this term, as used in the Act, it has not been well defined by decisions. In recording a case in which an award was sustained, notwithstanding an allegation, made in a suspension, that it purported to be based on certain facts which "were utterly false," the reporter, in his rubric, stated the general proposition, that "the exception of falsehood, in the Act 1695, regards only the falsehood or forgery of the submission or decree-arbitral."[1] The case is very briefly reported, but the facts do not appear to support this broad statement; nor is it easy to suppose that the challenge of falsehood, when stated against an arbiter, should be limited to the very rare case of his forgery of a submission or an award. It would rather appear, that where falsehood (or the *crimen falsi*) can be alleged against an arbiter, in any material particular connected with the due discharge of his office, it should be a relevant ground of challenge, although it did not refer to the falsehood or forgery, either of the submission or of the award.[2] If, for example, an arbiter falsified the evidence led before him, by wilfully putting down, in a witness's deposition, material statements which had not been made by the witness; or by wilfully suppressing material statements which had been made by him; this would seem, when duly proved, to be a good ground of challenge of an award, which purported afterwards to be rested on such falsified evidence. The term "falsehood" expressly and appropriately designates such acts, and it is difficult to see why it should not be held to apply to them. But if it did not, the constructive sense of the term "corruption" would appear to reach them.

677. It is to be regretted that the report of the case of Hardie is so brief. It was a suspension of a charge upon an award, in respect that certain facts, "mentioned in the decreet, as the foundation of the decerniture, were utterly false; which was offered to be proven by the oaths of the arbiters themselves. The Lords refused to sustain this as a reason of suspension," though it was urged that it fell within the words of the Act of Regulations, which allowed a challenge on the head of "falsehood," when affecting the arbiters, and must, therefore, comprehend "their pronouncing a decreet-arbitral upon false suggestions." Without an articulate statement of the precise "facts," which were alleged to be "utterly false," it is difficult to estimate the exact scope of this decision. Perhaps the circumstance, that the allegations were made in a process of suspension, and not in a reduction, may itself have had a material influence upon the judgment which was pronounced. But, however this may be, the case does not appear to bear out the very general proposition above quoted,

[1] Hardie, Dec. 18, 1724 (664).

[2] See case of Blain, *infra*, sec. 680.

as to the restricted meaning of the word "falsehood," in the Act of Regulations.

678. Where the allegation of falsehood resolved itself, substantially, into an averment, that the arbiters had not duly considered the copious productions in the submission, and nevertheless stated in their award that they had done so, the Court repelled the allegation as irrelevant. The award set forth, "that the arbiters had considered the claims of both parties, and answers thereto, with the several processes specified in the submission, with the whole procedure, minutes, and interlocutors therein;" and particularly a certain process of suspension, "and whole proofs led thereon," with certain "tacks," upon which a charge had been given to the tenants. The pursuers (the tenants) alleged that this statement could not possibly be true; the proofs, tacks, etc., being so very voluminous, that they could not have been perused or duly considered by the arbiters, within the time which the arbiters had given to them. The Court refused to allow a proof of these allegations.[1]

679. In another case, in which a reduction was brought of an award, as founded in "falsehood," the allegation was, that although, *ex facie* of the procedure, the witnesses were set forth as having been sworn, they had not in fact been put upon oath. Thus (it was said) there was no *evidence*, in a legal sense, laid before the arbiter; and, moreover, there was material falsehood committed by him, in recording that the witnesses had been sworn. It appeared, however, that the pursuer had all along been aware of the facts now founded on by him, and that he had taken no objection until after an award was pronounced, which was unsatisfactory to him. He was, therefore, open to the personal exception of being barred from now stating a plea which he had practically waived at the time; and also to the answer, that it was competent to him and the opposite party to assent, if they pleased, to the arbiter's disposing of the case upon the declarations of the witnesses, in place of their depositions: and that, practically, they had so assented.[2]

680. It may be noticed, that in the Session Papers in the case of Hetherington,[3] an unreported case is stated—Blain *v.* Crawford—in which allegations of falsehood were made, which the Court held to be relevant, but which failed on the proof. The pursuer of the reduction of the award averred, that though it set forth expressly that the arbiters had considered the claims of the parties and their vouchers, and that one of the parties had been examined by them, these material statements were wilfully false, inasmuch as no claims had

[1] Hetherington, June 21, 1771 (Dicty. Arbn., Appx. 3). Apparently the case of Mell, Jan. 2, 1700, 4 Suppt. 471, belongs to the same category with Hetherington.

[2] Stewart, Feb. 21, 1822, 1 S. 313.

[3] *Supra*, sec. 678.

been lodged at all, and the foresaid party was forth of Scotland, and had never been examined. The Court, holding these allegations relevant, examined the clerk to the submission on the subject, whose evidence negatived the pursuer's averments. The Court thereon sustained the award, and assoilzied from the reduction. It is evident, however, that the averments of falsehood in this case were very different from those in the case of Hetherington. If no claims at all had been lodged, and if no party was examined, there must have been direct and wilful falsehood on the part of the arbiters in stating that they had considered the claims, and had themselves examined the party. And the falsehood, if it existed, evidently went to the very foundation of the award.

681. An attempt was on one occasion unsuccessfully made, to state a presumptive or constructive falsehood, as equivalent to the falsehood which is required by the Act of Regulations. An award had ranked certain adjudgers, who were parties-submitters, *pari passu*. Thereafter a reduction-improbation was raised of one of the decrees of adjudication. The defender was unable to produce the warrants of the decree, and apparently decree of certification had been obtained *contra non producta*. The pursuer of the reduction-improbation then attempted to set aside the award, "as proceeding on forged grounds." But the Court held, that the presumptive falsehood of the decree of adjudication, arising from the certification, ought not to be allowed to have such an effect. L. Elchies observed: "We all agreed, that unless falsehood had been specially submitted and determined, it was still competent; but then we found it not sufficient, that these warrants were amissing and were not produced, unless some direct evidence was offered of the falsehood,—either that there were (no) such warrants, or that they were falsified." The Court "found it not competent to quarrel the debts and diligences of the defenders, which had been sustained and ranked by the arbiters, there being no direct evidence of actual forgery offered."[1]

682. With respect to the grounds of challenge of an award at common law, they have, as already mentioned, been necessarily anticipated so much, as to render superfluous anything more than a brief recapitulation now. The objections that an award is improbative; that it is *ultra vires* of the arbiter, on the one hand, or has failed to exhaust the submission, on the other; that its tenor is ambiguous and uncertain, or that its clauses are conflicting and inextricable; that it is not a decision of the matters submitted, but merely an amicable suggestion of a compromise; that it is not a genuine award, embodying the arbiter's own judgment, but merely a colourable and counterfeit award, embodying an agreement previously made between the parties, or, in other words, "a compromise wearing the

[1] Ogilvie, Nov. 2, 1744, Elch. Improbn. 4; and Nov. 28, 1744 (5198).

dress of an award;" that it is not final and conclusive, but leaves matters open or unsettled between the parties; that it was not a delivered instrument; that it had been impetrated *obreptione*, or by undue and improper agency on the part of one of the party-submitters; that it has been obtained by fraudulent imposition on the arbiter, practised by one of the parties-submitters;—these and other objections have been already considered.[1]

683. After an award has been executed and delivered, at the close of a submission which has been regularly conducted, the award will not be set aside upon the plea of *instrumenta noviter reperta;* at least where the party, who objects to the award, was not deprived of the use of the documents in question through any fraud or misconduct of his opponent. A charge upon an award was brought under suspension, on an allegation that the suspender had recently recovered a document so important, that if it had been before the arbiters, they would have pronounced a different award. He offered to prove, by the oath of one of the arbiters, that if the document had been laid before them, they would not have pronounced the award which they did. The suspender did not allege that he had been deprived of the previous use of the document by any fraud or irregularity of the other party. The Court unanimously held, that there was no ground for opening up the award. The reporter states, that their Lordships doubted, whether the document possessed the materiality which the suspender ascribed to it; but that, independently of this consideration, the Court "were clear that the decreet-arbitral could not be opened up, and that the suspension was incompetent."[2]

684. In a recent case,[3] in which two men of skill were mutually chosen under a submission-clause in a coal lease, to ascertain and report on the working state of a coal pit, which they reported to be exhausted, their report was challenged by the lessor, in respect that they had made no inspection of the workings; and, further, that they had examined the witnesses without putting them on oath. It appeared that the pit was "drowned," so as to be quite inaccessible; a fact which was known to the lessor when he concurred in naming the referees. It also appeared that they had employed the best means which remained to them, of performing their duty, by going to the coal pit, and examining all the witnesses, who were tendered on both sides, as being qualified to speak to the condition of the pit. The

[1] [The final award, however, is not necessarily invalidated by the fact that some of the arbiter's interlocutory orders have been *ultra vires*. Cox Bros. *v.* Binning & Son, Dec. 18, 1867, 6 Macph. 161.]

[2] Livingstone; reported in note to Kirkaldy, June 16, 1809, F. C. See also Sharp, May 17, 1813, 1 Dow 223; Ivory's Erskine, 4. 3. 35, note 192; N. Brit. Ry. Co., Nov. 27, 1855, 18 D. 102.

[3] Cochrane, March 30, 1861, 23 D. 865, 33 Scot. Jur. 430; and Feb. 3, 1859, 21 D. 369, 31 Scot. Jur. 205.

lessor had concurred in tendering witnesses to the referees, and had made no objection, at the time, to their not being sworn. The lessee, accordingly, maintained that, under the agreement in the lease, the fact in dispute was necessarily to be ascertained through the medium of a report or award by men of skill mutually chosen; that it was to be so ascertained,—equally whether the pit was "drowned," or not; and that the lessor, accordingly, though knowing the pit to be inaccessible, had concurred in naming the men of skill, so that any objection by him, on the ground of non-inspection, was untenable. Further, that arbiters were not bound to put all witnesses upon oath; and, at all events, the lessor, who had concurred in the whole procedure before the men of skill, was personally barred from raising such an objection now, after having taken his chance of obtaining a favourable award.[1]

685. The L. Ordinary, Kinloch, repelled the lessor's objections, found the coal exhausted in terms of the report, and declared the lease at an end. His Lordship observed in a note, with regard to the fact of the workings being "drowned," that "this afforded no reason for annulling the submission in the lease. The gentlemen named still remained arbiters for deciding the matter committed to them, bound merely to resort to the best evidence within their reach. There is nothing in the lease or elsewhere, which would make the submission depend, for its validity, on the kind or amount of the evidence remaining for the guidance of the arbiters."

686. With respect to the objection that the witnesses had not been put on oath, the L. Ordinary observed, that "he is not prepared to decide that arbiters are, in any case, absolutely bound to confine their inquiries to evidence on oath. There is scarcely, he believes, a case in which men of skill, employed in judicial investigations, do not take the information of those connected with the subjects, on one point or other, and commonly obtain it in the way of ordinary conversation." His Lordship then adverted to the lessor's acquiescence and concurrence in the procedure which the arbiters followed in dealing with the witnesses adduced on both sides; adding that it was now "impossible to listen to an *ex post facto* objection," and that it would be of the worst example if the lessor was now "to be permitted to upset the whole proceedings, because the judgment, which he deliberately left the arbiter to pronounce on such information, turned out to be adverse to himself, and in favour of his antagonist."

687. On a reclaiming note, the Court unanimously adhered. L. President M'Neill observed, that the men of skill "could not go down into the pit, but they investigated into what its condition was before the water got into it, by asking persons who knew what its state then was, and by asking their opinion whether it then was, or was not,

[1] Stewart, Feb. 21, 1822, 1 S. 313. See *supra*, sec. 679.

workable. There was nothing incompetent in that." With respect to the objection of irregularity in not swearing the witnesses, his Lordship remarked, that the proceedings of the arbiters "were taken with the consent and approval of both parties;" adding that he was "not prepared to say that the reporters were bound to put all parties upon oath. The reporters followed the usual course." The other Judges concurred.[1]

[1] The procedure and interlocutors in this case are instructive. The lessor had obtained decree in absence, declaring the coal exhausted, and the lease at an end. His libel contained an alternative conclusion, for enforcing the submission-clause against the lessor, which was meant to have been insisted in, if the lessor had made appearance. After the decree in absence was extracted, the lessor brought it under suspension, and maintained, *inter alia*, that, in that process, which only embraced the particular decree which had been pronounced, the lessee could not insist on enforcing the submission-clause, because the conclusion relative thereto had been practically thrown out, when decree was taken in terms of the other and alternative conclusion of his libel. The Court pronounced this interlocutor: Find that, "while the complainer is entitled, in this process of suspension, to establish that the decree under suspension is ill-founded in so far as it finds and declares, contrary to the state of the fact as averred by the complainer, 'that the coal in dispute did, on or about the 4th day of April 1851, become exhausted and not workable to profit:' yet on the other hand, the respondent is entitled to insist that, at all events in the first instance, this question of fact shall be ascertained and determined in the way and manner stipulated in the lease—that is to say, by proper persons of skill to be chosen mutually by the 'contracting parties,' in terms of the said lease; and find that, to this effect, the complainer is bound to concur with the respondent in mutually choosing persons of skill accordingly: Find that there is nothing in the shape of the case, nor more particularly in the terms and import of the decree under suspension, or in the circumstances of the present process, being a suspension of that decree, to entitle the complainer to shake himself quit in this process, more than in the original action, of his obligations in the above respect, contained in the lease; and that, on the contrary, it is not open to him, at least in the first instance, to impugn the decree under suspension, otherwise than in accordance with his said obligations."

The Court, at the same time, remitted to the L. Ordinary to hear parties whether there was still a subsisting reference; and, if not so, then "to direct such steps now to be taken, as may be necessary towards the parties of new mutually choosing proper persons of skill, for the end and in the terms set forth in the lease." Under this remit a question arose, whether an oversman should be named, in order to provide against the emergence of a difference of opinion between the referees. The lease had made no provision for the nomination of an oversman, and the Court refused to ordain the parties to do more than name two referees in terms of the lease. Referees were named, who concurred in reporting that they proceeded to the coal works, and "met by appointment with parties' agents, accompanied by the party (suspender), and the parties who had been respectively the manager and oversman of the colliery, and went carefully over the ground, when the various pits and workings were pointed out, and an examination made, so far as the surface was concerned. It having been found, as the result of this examination, that the workings were 'drowned' by the accumulation of water therein, and were otherwise altogether inaccessible, the reporters were necessarily obliged to have recourse to the best available means of satisfying themselves. They accordingly proceeded, with consent and approval of the parties, to appoint a clerk, and with his assistance

688. It has already been stated, that what is technically termed "iniquity" affords no relevant ground for setting aside an award. The honest error of judgment which an arbiter may commit, either in fact or in law, is a risk which is foreseen by the parties at the time of entering into the submission, and which, by their contract, they agree to encounter, for the sake of obtaining a final and irrevocable decision of their dispute.[1]

689. It would appear that interlocutory orders or deliverances by an arbiter, even although they may be *ultra vires*, may not form a proper subject of reduction, pending the submission (if the submission itself be not reducible), inasmuch as it is still competent to the arbiter to retrace his steps in the submission itself. In a case in which a reduction was brought of orders or deliverances which were of an interlocutory character, the Court, while holding them to be clearly *ultra vires*, nevertheless assoilzied from the reduction, "in respect that no decreet-arbitral, or conclusive judgment in the submission, has yet been pronounced, and that it is still subsisting;" and "found that there are no *termini habiles* for *now* pronouncing any formal decreet of reduction of these interlocutory deliverances of the arbiter." The Court, however, not only pronounced certain findings as to the limits of the arbiter's powers under the submission, but also qualified their judgment of absolvitor, by reserving right to the pursuer "to insist for reduction of any decreet-arbitral, interim or final, which may be pronounced by the arbiter, inconsistent with the nature and condition of the submission, as found by this interlocutor."[2]

690. In a submission with a party as executor-dative of his deceased son, an award was pronounced in favour of the executor, who gave a charge upon the award. This was brought under suspension, on the allegation that the charger was not duly vested with the office of executor at the date of the submission, and moreover, was not entitled to it, as the deceased son had left brothers and sisters. But the answer was held good, that the charger had already taken out an edict from the Commissary, with a view to be confirmed executor, at the date when the submission was entered into; that he had been duly

to examine, in presence and with assistance of the agents, the various persons who, as manager, oversman, engineers, colliers, and otherwise, had been employed about the colliery while in operation, and were acquainted with these operations, together with other skilled persons, who were presented for that purpose by the parties; notes of the witnesses' statements being recorded for reference; and the parties having this day declared their evidence closed, and been heard upon the whole matters, the reporters have now respectfully to report" that the coal "had become exhausted by being fairly worked out," etc. It was to this report, when returned to the Court, that objections were stated, which were repelled by the Court, who declared the lease at an end, as above mentioned.

[1] 4 Ersk. 3. 35.

[2] Halley, July 9, 1833, 11 S. 942. [Walls *v.* Connell, June 5, 1862, 24 D. 1048; Cox *v.* Binning, note 1, p. 333.]

confirmed executor, pending the submission; and that he had also procured a renunciation in his favour, from the brothers and sisters of the deceased, of all claim to the office of executor.[1]

691. It was on one occasion maintained, in a reduction of an award, that the defender was bound to produce the grounds and warrants of the award, and, *inter alia*, the Claim which had been made in the submission. But "the Lords found no necessity to produce the Claims, which were not preserved nor noticed after decreet (arbitral), as in the case of a Judge-Ordinary having a record."[2]

692. It will be observed, that when the reduction of an award is raised upon grounds which involve an imputation upon the arbiter personally, he ought to be called as a defender, as well as the party-submitter who founds upon the award. Where the arbiter has not been called in such an action, it has been held competent for him to present a petition to the Court, pending the reduction, and thus to seek an opportunity of vindicating himself from any offensive and injurious imputations which may have been brought under the view of the Court in the process of reduction.[3]

CHAPTER VII.

EVIDENCE ADMISSIBLE IN REDUCING OR DEFENDING AN AWARD.

693. It often happens, in an action of reduction of an award, that the evidence admissible on either side is not marked with any specialty proper to arbitration law; as, for example, in reductions on the head of fraud, where a proof, *pro ut de jure*, would seem to be the natural course for investigating the averments of the parties. An instance of this appears to be afforded in the case of Dalgliesh, Jan. 29, 1742, where the Court reduced an award on the ground of fraud, in which the arbiters were participant. The Court visited the guilty arbiters with fine and imprisonment. Their interlocutor, which is recorded of the above date in the Books of Council and Session, "to the terror of others from committing the like practices in time coming," purports to proceed upon a consideration of "the testimonies of the witnesses, writs produced," etc., indicating that a proof at large had been taken in the case.

694. But it also frequently happens, that in the reduction of an award, the evidence which is tendered is of a class which is peculiar

[1] Abbott and Son, May 12, 1824, 3 S. 3.

[2] Brown, July 22, 1675, 2 Suppt. 187.

[3] Campbell, Nov. 13, 1813. Excerpt from L. Pres. Boyle's Note-book, quoted in Parker's Syn., xxiv. 76.

to arbitration, such as that of the oaths of the arbiters, or oversman, and their clerk, or the notes of the arbiter, or the minutes of procedure in the submission, and the pleadings in process. The extent to which these several kinds of evidence can be so made available, forms an interesting subject of inquiry.

695. Where a relevant reason of reduction of an award is rested upon allegations relative to the *res gesta* in the submission, and to the personal actings of the arbiters, the Court have frequently allowed, and sometimes, *ex proprio motu*, have appointed, the examination of the arbiters and their clerk, in order to ascertain the truth of the allegations. As the oath of an arbiter, however, is that of a witness merely, and not of a party, it is only admissible in order to establish such relevant facts as can be proved by parol evidence. But, in so far as relevant facts, occurring in the *res gesta* of a submission, have fallen under the personal observation of the arbiters or their clerk, if these facts are *sua natura* probable by parol, the arbiters or their clerk may be competently called to prove them.[1]

696. Thus, where the pursuer of a reduction of an award alleged that it contained a certain reservation, which had the effect of preventing the award from exhausting the submission, he was met by a plea of personal objection. The defender averred that this very reservation had been introduced into the award, only at the special desire of the pursuer himself; and he pleaded, accordingly, that the pursuer was thereby personally barred from founding a challenge of the award upon it. The Court allowed this matter of fact to be proved by the oaths of the arbiters and their clerk;[2] overruling an objection to the competency of leading such proof.

697. The pursuer of a reduction of an award alleged that a submission, when delivered to the arbiters, was blank in the endurance (so as only to have a legal endurance of one year), and that the arbiters had unwarrantably filled into the blank an endurance for three years. "The Lords ordained the arbiters' oaths to be taken, whether the submission was blank in the endurance when it was delivered, and found that, if it was blank in the endurance, it endured but for a year."[3]

[1] [It is, however, inexpedient to examine an arbiter as to the motives which led him to pronounce his award. Per L. Neaves, in Cameron *v.* Menzies, Jan. 25, 1868, 6 Macph. 279.]

[2] Arthur, July 16, 1773 (667), and Hailes' Dec. 534; quoted *supra*, p. 223, note 1.

[3] Wallace, Feb. 23, 1672 (639). Though this and the following case occurred prior to the Act of Regulations, they appear to be only the first of a series of similar cases which have continued to modern times. It must be admitted, however, that there are some case of this early date, in which the oaths of arbiters, *functi*, were received to an effect which would not now be permitted; such as that of explaining away part of a delivered award.—Hays, Dec. 9, 1671 (12319). See also Davidson, Jan. 22, 1684 (12327); Young, July 2, 1678, 2 Br. Supp. 230.

698. The pursuer of a reduction of an award, alleged, *inter alia*, that the arbiters had refused to show him the claim which was lodged against him. This was found relevant to be proven by the arbiters' oaths.[1]

699. The pursuer of a reduction of an award was met by a plea of homologation and acquiescence, inasmuch as he had accepted a certain document from the arbiters without objection. He answered, that the document was given to him under seal, by the arbiters, who exacted an oath that he would not break the seal till next day; and that he had objected, as soon as he broke the seal. The Court ordained the arbiters to be examined on oath as to the truth of these statements.[2]

700. In a submission, power was given to the arbiters, or, in case of their differing in opinion, to either of them, and the oversman (who was named in the submission), to decide. An award was pronounced by the oversman and one of the arbiters, which narrated that the arbiters had differed in opinion, and had called in the oversman. A reduction of the award was brought, on the ground, *inter alia*, that this allegation was false, and that the arbiters had never differed in opinion, though one of them, Carse, had been unavoidably prevented, to some extent, from meeting with the other. The Court, *ex proprio motu*, appointed Carse to be examined on oath. He was accordingly examined as to the procedure which had taken place between the other arbiter and himself, under the submission; the times and places of their meetings; the extent to which they had proceeded in investigating the matters submitted; and the grounds on which he considered (as he said he did) that they had not come to any difference of opinion, requiring the interposition of the oversman. The Court, on considering this deposition, "in respect there is no written evidence that the arbiters had differed in opinion," reduced the award; but, on a reclaiming petition from the defender, their Lordships, before answer, allowed the other arbiter, the oversman, and the clerk to the submission, to be examined. They were accordingly examined on the same class of topics to which Carse had spoken, including the circumstances under which the oversman had been called in. On considering their depositions, the Court altered their former interlocutor, and sustained the award. On an appeal, L. Thurlow, C., held that "the case of the two arbiters, Robert Gray and James Carse, varying in opinion, is sufficiently established, and that thereupon David Muir (oversman) and Robert Gray had competent authority, according to the terms of the said submission, to give forth and pronounce a decreet-arbitral."[3]

[1] Brown, July 22, 1675, 2 Br. Supp. 187.

[2] Grant, Dec. 9, 1679, 2 Br. Supp. 253.

[3] Colquhoun, July 27, 1784, 2 Paton 626. For some remarkable incidental procedure connected with this case, including the punishment of an ex-arbiter, for

701. The pursuer of a reduction of an award alleged that the arbiter avowed it to be his constant practice, before he proceeded to make up his final opinion, to require a written admission from both parties, to the effect that they had no more proof to offer; that the arbiter had specially intimated that he was to follow that practice in the submission in question; and that the clerk to the submission had accordingly obtained such a written admission from the other party, and, moreover, in the erroneous belief that he had also obtained it from the pursuer, had represented to the arbiter (contrary to the fact) that both parties had lodged a written admission that they had nothing more to offer. But (the pursuer alleged that) he had lodged no such admission, and, on the contrary, possessed material evidence which he still wished to adduce, but which he was prevented from doing, in consequence of the arbiter, under the erroneous impression caused by the clerk's mistake, having proceeded to give forth his award; which was now brought under reduction, in respect that parties had not been duly heard. In expiscating the truth of these facts, the agent of the pursuer, from whom the letter of written admission was said to have been got, the arbiter, the clerk to the submission, and his office-clerks, besides other witnesses, were examined.[1] Upon the facts, as established by the proof, the award was eventually reduced in the House of Lords.

702. An award having been pronounced in a submission for valuing lands which were the subject of excambion, one of the parties raised a reduction of the award, alleging, *inter alia*, that the oversman had refused to receive any claim on his part, or to hear him; and that the oversman had refused to allow him to be present at a perambulation of the lands, though he allowed the defender, or some person on the defender's behalf, to be present, and heard them at great length, both during the perambulation and subsequently. The defender denied these allegations, and stated that the pursuer had been asked by the oversman to attend at the perambulation, and had declined, etc. The Court allowed both parties a proof, and a conjunct probation, in the course of which the persons present at the perambulation, and also the oversman, were examined as to the subjects above mentioned. Certain relative letters, which passed between the several parties, were also recovered and founded on. Upon this proof, the averments of the pursuer, so far as relevant, were held to be negatived, and the award was sustained.[2]

prevarication as a witness, see *supra*, sec. 364, note 1. [See also Frederick *v.* Maitland and Cunningham, July 7, 1865, 3 Macph. 1069.]

[1] Sharpe, Feb. 24, 1815, 3 Dow 102.

[2] Macdonald, Dec. 8, 1843, 6 D. 186. See also Low, June 2, 1836, 14 S. 869, in which a judicial referee and his clerk were allowed by the L. Ordinary, Jeffrey, to be examined.

703. It would appear, therefore, to be the general rule, that when a pursuer avers facts, which, if true, are relevant to reduce an award, and when these facts relate to the *res gesta* under the submission, and the actings of the arbiters, the oversman, or the clerk, it is competent to examine on oath the arbiters and oversman, and their clerk (as well as any other witnesses possessing personal knowledge on the subject), in order to establish any facts which admit, *sua natura*, of being proved by parol evidence. But there are some facts connected with the alleged *res gesta*, which, however important, a party has not been allowed so to establish.

704. When it appeared, in the reduction of an award, that the award was, "in one or two heads," *ultra vires*, the defender offered to prove, "by the judge (arbiter) and witnesses insert," that the pursuer had consented verbally to include these "heads" within the submission. The Court refused to allow this proof. It would, in effect, have laid open a solemn written instrument of submission, to be altered to any extent by parol.[1]

705. In a case in which a minute, devolving the submission upon an oversman, narrated that the arbiters had differed in opinion before devolving, and was signed by both arbiters, it was nevertheless offered to prove, in a suspension of a charge upon the oversman's award, that the arbiters had never differed in opinion. The proof offered was the oaths of the same arbiters who had signed the minute of devolution. The Court held the proof incompetent.[2]

706. Where an oversman pronounced an award, which did not set forth that the arbiters had differed in opinion, a reduction was raised, alleging that the oversman had no authority to act, as the case had never occurred—viz., the arbiter's variance—which was a condition precedent of his acting. The defender averred that the arbiters had, in truth, differed before they named the oversman; and he offered to prove this fact by the oaths of both the arbiters themselves. But "the Lords found the decreet-arbitral, not bearing the arbiters to have varied, null; and that the nullity could not be supplied by after probation."[3]

707. This case appears to contrast with that of Colquhoun,[4] in which the arbiters and oversman and the clerk were examined on the question whether the arbiters had differed in opinion before the oversman (who was named in the submission) was called on to act. In Colquhoun's case, the award was, *ex facie*, regular and valid. But it was alleged that it set forth falsely, that the arbiters had differed. If this averment was true, the award, though *ex facie* valid, was

[1] A. *v.* B., July 25, 1616 (662). See also Dalgettie, Nov. 16, 1574 (12300).

[2] Campbell, Jan. 31, 1812; Excerpt from Note-book of L. Pres. Boyle, in Parker's Syn., xvii. 55. It will be observed that the proof was offered in a suspension.

[3] Gordon, Nov. 30, 1716 (655).

[4] *Supra*, sec. 700.

actually inept, and reducible. The Court, accordingly, allowed the proof, for the purpose of determining whether to sustain the award. But in Gordon's case, the award was *ex facie* null, as it did not set forth *in gremio* that which was essential to the validity of an award by an oversman, viz., the statement that the arbiters had differed in opinion. The Court, apparently, held this to be an intrinsic nullity in the award, which affected it, as it passed out of the hands of the oversman, who thereon became *functus*, and the submission came to an end. And this intrinsic nullity in the award, as it existed at the expiry of the submission, the Court held could not be cured by any after proof that the award might warrantably, in point of fact, have set forth the variance of the arbiters. Because the result would still be, that, at the close of the submission, the award itself did not set forth that fact, and was thus intrinsically null, as it came from the oversman's hands; and as he could not thereafter add anything to it, or take anything away, still less could any other party do so. The award, therefore, remained affected with incurable nullity.

708. So, in like manner, if an award, as written out by the clerk, and delivered by the arbiter at the close of the submission, was an improbative writ, for want of the writer's name or otherwise, it would not be binding on the parties, if it was not supported by subsequent homologation or *rei interventus*. The award being in the foresaid condition, when it was delivered at the close of the submission, and the maker of it became *functus officio*, it would be in vain to offer proof by the arbiter himself, and any number of direct witnesses, to the effect of demonstrating who the writer was, viz., the clerk to the submission. Any such proof, however convincing, would still leave the fact untouched, that the award, as it finally came from the hands of the arbiter, was intrinsically null;[1] after which, nothing could validate it but some act of the parties-submitters themselves, in the form of homologation or *rei interventus*.[2]

709. There is another limitation on the resort to the evidence of arbiters, in questions affecting the validity of an award; they cannot be examined, to the effect of explaining an ambiguous award which has been delivered by them.[3] The award of an arbiter, like the

[1] Percy, Nov. 25, 1808, F. C.

[2] The views which were expressed by some of the Judges, in E. of Hopetoun, March 6, 1856, 18 D. 739, as to supporting an award which they were satisfied was genuine and authentic, though improbative, do not apply to the case now under consideration, which is that of a Scotch award.

[3] Woddrop, Feb. 4, 1794 (628). See this case mentioned *supra*, sec. 478.

It may be noticed, as in some degree connected with the present subject, that the oath of an arbiter has been held to be as unavailing as any other mere parol evidence, to qualify the terms of a delivered disposition, *ex facie* absolute, which was executed by one party-submitter in favour of another, pursuant to notes of opinion issued by the arbiter.—Guthrie, Mar. 18, 1858, 20 D. 825.

decree of a Judge, should be self-contained, and capable of explaining itself. Its legal import is the subject of construction rather than of evidence.

710. The Notes which an arbiter has made from time to time, during the progress of a submission, may often be an important adminicle of evidence, when a proof is allowed of facts respecting the *res gesta* under the submission. For example, "when the objection stated to an award is, that a party has not been heard, it may often be of importance to look at the notes of the referee, with a view of discovering whether the objection is well founded or not."[1]

711. An attempt has sometimes been made, however, to use the arbiter's notes, in a reduction of an award, to a very different effect. They have occasionally been referred to, for the purpose of rearing up some alleged inconsistency in the award, or of showing that the award was *ultra vires*. But unless the award has, *in gremio*, referred to the notes, so as to incorporate them with itself, or to cause them to be read as expository of its own tenor, the notes are not available for the purpose of contradicting, or limiting, or otherwise qualifying the award. It is usual for an arbiter to issue notes of his opinion during the progress of a submission, so as to make the parties aware of his views, and to guide them in regard to the representation, or other argument, which they may address to him. But since these notes merely record the arbiter's opinion, as it was at the time of issuing them; and since they only thus record a tentative and preparatory stage of opinion, while he was maturing his ideas in order to pronounce the award; it remains within the power of the arbiter to adopt views at variance with his notes, as he may change his mind, up to the last moment, before signing and delivering his award. Moreover, it is his duty, in framing his award, to give effect only to the opinion which he then finally entertains, however much it may vary from any notes which he may previously have signed and issued to the parties. When, therefore, an arbiter, in his award, does not refer to his notes, it is in vain to found on the notes as qualifying the tenor of the award; for example, as proving that the award was founded upon a ground of judgment which was not within the submission, and that it was therefore *ultra vires;* provided that the terms of the award, taken *per se*, do not support such a plea. The ablest Judges are known, in difficult cases, to have changed their views from time to time, while maturing their opinions: and conscientious arbiters may well do the same.

712. But the case is different when the notes of an arbiter have been so referred to in his award, as to be incorporated therewith, or to be rendered expository of the tenor of the award. They may then be competently founded on, either in the attack or defence of the award,

[1] Per L. J. Clerk Hope, in Wauchope, June 16, 1846, 8 D. 816.

as the case may be, according as they may be held either to create or to remove some *repugnantia* between the parts of the award, or otherwise to affect its validity.[1]

713. Respecting the use which may legitimately be made of an arbiter's notes in support of a reduction of his award, the case of Ferguson[2] is instructive. An alimentary annuity of £20 was claimed by a natural child from the trustees of her deceased father, as being due under a bond of provision for that amount. The widow (who was residuary legatee) maintained that, by the subsequent marriage of the deceased with her, the bond had been revoked by implication. The question was submitted to an arbiter, the child's claim being rested, in the deed of submission, solely on the bond. In the pleadings, however, it was maintained that the sum in question was also due to the child *ex debito naturali*. The arbiter, after issuing notes which intimated that he held the bond to have been revoked, made an award which did not refer to these notes, and which found an annuity of £12 to be due, "in all the circumstances of the case." In a reduction of the award, as *ultra vires*, the widow pleaded that the only question submitted to the arbiter was the liability under the bond; that the arbiter's notes showed he held the bond to have been revoked; and, accordingly, he had only given decree for an annuity of £12, though the bond was for £20. His award must, therefore, have been rested upon the alleged liability *ex debito naturali*, or upon some other ground than the bond, which, however, was the only question within the submission. The defender answered that the award did not refer to the notes, and did not in itself say anything as to the revocation of the bond, or as to liability *ex debito naturali*. It merely found £12 yearly to be due, "in all the circumstances of the case." This was quite consistent with the arbiter's having ultimately held that the implied revocation of the bond was partial only, and *quoad excessum*; which was a finding clearly within the arbiter's powers. And it was irrelevant to plead that his notes, at a preparatory stage of the procedure, showed him at one time to have held the bond to have been revoked *in toto*. He might, nevertheless, have finally held that the revocation was partial only; and that was enough to support the award.

The L. Ordinary, Newton (2), founding on the notes as qualifying the award, reduced the award; but the Court unanimously altered, and held that, as the award did not refer to the notes, and was in itself unimpeachable when construed by itself, it ought to be sustained. L. J. Clerk Boyle observed: "Unless the decree itself affords grounds of reduction, I deny the competency of looking to notes to

[1] Mackenzie, Mar. 9, 1843, 2 Bell's App. 43. "The notes are very properly referred to here, because they are referred to by the award itself."—Per L. Cottenham, *ibid.*

[2] June 20, 1828, 6 S. 1006.

discover such grounds. The decree here does not refer to notes, or embody them," etc. L. Glenlee.—"This decree may just be what an arbiter would do, who once thought the deed revoked, and may ultimately think it only revoked *quoad excessum*, as the revocation is only presumed."[1]

714. It may be observed, that it can rarely be an eligible course for an arbiter to make an incorporating reference to his notes, in extending his award. Notes are seldom expressed in a manner at once so clear and methodical, so complete and yet non-redundant, so exactly stating all that is finally concluded in the arbiter's mind, and yet nothing that is still immature, as to make it safe or beneficial to render them part of an award, with which they would often practically prove to be not in all respects homogeneous.

715. The notes of an arbiter, stating his views upon the subjects under submission, besides affording evidence of the opinions which he entertained on these subjects, at the date of making these notes, show also the particular subjects to which his mind was then applied. Whenever, therefore, it becomes afterwards relevant to inquire into this last matter, the notes may apparently be founded on for that purpose, whether they are referred to in the award or not. This is quite a different application of the notes from that of holding them as part of the award. It is merely using them as one of the "surrounding circumstances" (as they have been termed) in the position of the maker of a deed, which assist the reader and interpreter of that deed in getting at its true meaning (where that is at all obscure), by placing him more nearly in the same position which was occupied by the maker of the deed, and thereby enabling him to see the words of the deed, in the same light in which they were seen by the maker of the deed, when he was writing it. An illustration of this observation occurs in the case of Bell,[2] in which a widow had claimed, *inter alia*, her terce, under a general submission, which empowered the arbiter to issue interim awards. By an interim award, the arbiter determined the extent of the lands affected with her terce. Thereafter, certain further procedure took place, but the submission expired without any other award having been pronounced. The widow subsequently brought an action against the heir, who had been the other party in the submission, alleging that part of the lands, liable to her terce, had been sold after her husband's death, and before the submission was entered into; that the award had merely dealt with her terce of the lands unsold; and that she had a claim for the interest of one-third of the price of the portion of the lands which was sold, which claim

[1] See also opinion of L. J. Clerk Hope, as to the incompetency of using an arbiter's notes for the purpose of overthrowing his award, in such circumstances as occurred in Wauchope, June 16, 1846, 8 D. 816.

[2] Dec. 8, 1825, 4 S. 289.

was before the arbiter, and was *in cursu* of being decided by him when the submission expired. Her action concluded for payment of the above interest. It was pleaded in defence, that the claim was included in the award already pronounced, and that the award was *res judicata*. To obviate this plea, the pursuer referred, *inter alia*, to the arbiter's notes, which the Court held to be competent. The notes instructed the facts to be as alleged by the pursuer, and the Court therefore repelled the defence. "Their Lordships held that, although they could only look at the arbiter's notes to ascertain whether he had decided this claim, in awarding the terce, they were entitled to look at them to that effect." [1]

716. As the minutes of procedure which are made up in a submission, form a written record of the *res gesta*, in so far as embraced therein, it would appear that these minutes, when duly proved by the arbiters or the clerk, are available, and have been often used as evidence in any question of fact, turning upon such *res gesta*. As, for instance, if the pursuer of a reduction of an award alleged that he had never been allowed a hearing; the minutes (if such were extant) of a sederunt at which both parties were entered as having attended the arbiter and been heard by him, would, when duly proved, be a material element in determining on the truth of the allegation. Or if a party alleged that a proof had been taken in his absence; the minutes, if there were such, recording his presence as well as that of the other party (or recording the reverse), would in like manner be important. And so also as to all other matters which properly belong to the ordinary procedure of a submission. A remarkable instance of the importance of minutes of procedure, as affording evidence of the *res gesta* under a submission, occurred in the case of Elliot.[2] The report of the case bears, in regard to the facts upon which a successful challenge of the award was brought, that "of this transaction no notice was taken in the decreet-arbitral, though stated in minutes framed by the arbiters."

717. With respect to the written pleadings, etc., of the parties, wherever they serve to instruct relevant facts, they may be competently founded on, either in a reduction or defence of the award. If it were alleged, for example, that a party had never been heard; his written pleading, extant in the process of submission, would be material and competent evidence, when duly proved to have been lodged. Or if it was alleged that a proof had been led in a party's absence, the record of the proof, showing that he was entered as being present, and that he

[1] It may be remarked, that the report in Bell's case bears that the notes had been drawn out by the arbiter "after he had given his decree." But this was merely an interim-decree, and the notes had nevertheless been made in the ordinary course of procedure, during the currency of the submission, and with a view to the arbiter's ulterior procedure. See Session Papers.

[2] Dec. 15, 1789 (668); see *supra*, sec. 243, note 2.

had cross-examined the witnesses, when duly proved by the clerk who was present and made up the record, would be relevant and important evidence. Or if, again, it were alleged that an award, under a general submission, had disposed of a claim which was never brought before the arbiter for judgment, the claims and pleadings, or proof, *hinc inde*, would be available elements of evidence to be taken into consideration in dealing with such an averment. Or if it were alleged, on the other hand, that the award failed to exhaust the submission, the same elements of evidence might frequently be found available (*inter alia*) for determining the fact.[1]

718. Considerable discussion took place in the case of Brakenrig,[2] as to the use which may be legitimately made of an arbiter's notes, and the proof and pleadings before him, to support the reduction of his award. But, in that case, an attempt was made to employ them for an entirely incompetent purpose; that, namely, of merely establishing an error in judgment against the arbiter. It was accordingly disallowed. The case was one of judicial reference of a cause, after issues had been prepared for trial in the Jury Court. When the referee reported his award to the Court, objections were stated to the interposition of the authority of the Court. In disposing of these, L. Moncreiff observed: "The defender tries to make a strong demand for production of the notes of the arbiter, and the notes of the evidence, saying, Give me them, and I will prove—what? That the arbiter misconstrued the issues, misconstrued the agreement, admitted evidence that was irrelevant on the right construction, and ultimately decided erroneously. What is this but an averment of error of judgment? If the decree or award is plainly within the matter submitted, and no plain denial of justice can be averred, there can be nothing clearer to my mind, than that we can take no cognisance of the referee's grounds of judgment, his notes of those grounds, the evidence on which he proceeded, or his mode of regulating the proceedings; for this simple reason, that, by the contract of parties, he was constituted the sole judge of the whole matter, and of all the details of it. Therefore (and though I do not think it would much avail the pursuer) I think that he has no legal right to demand production of the arbiter's notes. The short answer to this demand is, that he has not condescended on anything relevant, to entitle him

[1] "When an award, in a judicial reference, is challenged on the ground of excess of jurisdiction, we must look to the points submitted, and to the course of pleading of the party that challenges it."—Per L. J. Clerk Hope, in Wauchope, June 16, 1846, 8 D. 816. See also N. B. Railway, Nov. 27, 1855, 18 D. 102, in which the pleadings of the parties were founded on, in disposing of a reduction of an award on the ground of *ultra vires*, and were held sufficient to show that the award was within the arbiter's power—the contract of submission having been enlarged by the pleadings of the parties.

[2] Dec. 17, 1841, 4 D. 274.

to such an investigation." The other Judges concurred, and the authority of the Court was interponed to the award.[1]

719. Perhaps it may be stated, as the result of the cases on this subject, that while it depends on the principles of the law of arbitration to determine whether certain facts which are averred by the pursuer or defender of a reduction, respectively, are relevant to set aside or to sustain an award, it generally belongs merely to the ordinary rules of the common law, to determine what species of evidence is, or is not, admissible for establishing these facts.

CHAPTER VIII.

SUBSEQUENT USE OF PROOF WHICH HAS BEEN LED IN AN EXPIRED SUBMISSION.

720. As there are various contingencies which may have the effect of frustrating a submission, either from its accidental expiry without an award or otherwise, parties frequently sign a written agreement at the commencement of the arbitration, or insert a special provision in the submission itself, to the effect that all proof which may be led before the arbiter, shall be available, *quantum et quale*, in any after submission, or process at law between them, in the event of the submission expiring without an award. Russell, in his "Theory of Conveyancing,"[2] suggests that the submission should contain "a provision and declaration, that proofs taken by the arbiters in the course of the submission, shall be holden by the parties to be equally good, and shall bear equal faith in all Courts of law, as if they were taken by any of the Judges."

721. But, even with respect to evidence which has been originally taken before a Court of law, there are important limitations, affecting the right of using in one process the evidence which has been led in another. These will be found stated, along with the relative authorities, in 2 Dickson 959, [2d ed., 1116], sec. 1923, *et seq.* But it would appear that, subject to these same limitations, and especially after such an agreement by the parties as that above mentioned, the evidence regularly taken on oath before an arbiter, who is attended by both parties, examining and cross-examining the witnesses, should be admissible in any after process in Court, if the same evidence would have been

[1] See, in connection with this subject, the case of Williamson, June 18, 1777, 5 Suppt. 428, which resulted eventually in a reference to the oath of the suspender of a charge upon an award.

[2] P. 115. See Appendix.

admissible in such after process, if it had been originally led before a Court of law.

722. It is true, that if an arbiter has admitted evidence which a Court of law would have necessarily rejected as incompetent, that evidence will not become more admissible in a subsequent process in Court, from the circumstance that it had once been received from sworn witnesses in the submission. It will be neither the better nor the worse on that account. If, for instance, an arbiter has allowed parol evidence to be led, to limit and qualify an absolute disposition of land, and thereafter the submission has fallen without an award, the parol evidence would be rejected in any after process in Court as incompetent. It would be equally rejected, whether it was tendered in the form of the recorded depositions of witnesses who had died in the interval, or in the form of a re-examination of the same witnesses if still alive; because the law, which a Judge is bound to administer, has declared, on grounds of public policy, that parol proof shall not be competent to qualify an absolute disposition of heritage. And "if the proof by witnesses was not legal, it cannot be regarded before a Judge, who must give sentence upon a competent proof."[1] "For Judges ought to lay no weight whatever upon that kind of proof which the law rejects."[2] This is subject, however, to the explanation, that any objections to evidence, which a party could effectually waive by a special consent, given in Court, would be held equally waived by him, on producing his signed consent, as given in the submission, with the very purpose of its being eventually so used in Court to that particular effect. If parties to a submission should agree, for instance, that a certain copy of a document should be held, as between them, of equal authenticity with the original; and if, on the fall of the submission, that copy should be produced in an after process between them, relative to the same matters; it would be as available in that after process, as it would have been originally in the submission, provided that the agreement made in the submission was held, when when fairly construed, to apply to such use of the document in the after process at law.

723. With respect to the oath of party, emitted on a reference in the course of a submission, it would be receivable in any subsequent process, relating to the same matters, and between the same parties. "This arises from the transaction implied in a reference by one party to the oath of another."[3] The effect due to an oath, which had been emitted in a submission, when thus produced in a process in Court, would appear to be the same which would be given to it if it had been originally emitted in a previous process before a Court of law, which

[1] 1 Bankt. 23. 19. [2] 4 Ersk. 3. 36.

[3] 4 Ersk. 3. 36; 1 Bankt. 23. 19; Wright, Jan. 2, 1708 (14033); Sochan, Nov. 30, 1709 (14034).

subsisted between the same parties, and put the same matters in issue.[1]

724. When it is intended to secure that a writing, which contains a statement or admission by a party in a submission, shall afford good evidence against him of that statement or admission in any after procedure, the arbiter can do this most effectually by requiring him to sign it himself. For then, "being in writing, and signed by himself, it is to be regarded in the light of an admission, which will not only bind him, though in a different suit, but would have bound him though in no suit at all."[2]

725. With respect to parol proof, which has been regularly led in a submission which eventually proved abortive, the Court have held, in a subsequent process between the same parties, "that the probation taken before the arbiters ought to be admitted as evidence, so far as the same is *habile*, and concluding upon the subject-matter of it, reserving all objections upon the import or insufficiency thereof; and reserving to either party to re-examine such of the witnesses as are alive, the party being always at the charge of the re-examination, and the former depositions being previously cancelled; lastly, reserving to either party to adduce what other proof they think necessary."[3]

726. The case of Chalmers was affirmed on appeal.[4] In referring to the affirmance by the House of Lords, Elchies says, "*sed vide*, if their judgment be not founded on some specialty not noticed in the interlocutor." The judgment of the House of Lords "declared that the said proof, taken under the submission, having been in some degree authorised by the Court, by granting diligence for summoning the witnesses to be examined before the Sheriff of Ayr, and the appellant having acquiesced so long under the interlocutors touching this point, the said interlocutors, so far as they relate thereto, ought to be affirmed." It appears from the appeal papers, that the arbiters (who included two Lords of Session in their number) had named the Sheriff of Ayrshire their commissioner to take the proof, and report to them in common form. The proof thus taken was therefore not more "authorised by the Court," than occurs in every proof before an arbiter, which is taken in virtue of diligence granted by the Court for summoning witnesses to appear and depone before the arbiters or their commissioner. Even if the reference to "acquiescence," which is contained in the judgment of affirmance, might be thought, of itself, to affect the judgment with specialty, it will be observed that Erskine, writing subsequently, states it unqualifiedly, as matter of general doc-

[1] Wright and Sochan, *supra*. See, in connection with this subject, Hunter, Nov. 29, 1836, 15 S. 159; 4 St. 44, 7, and 8.

[2] Per L. Brougham, in Marianski, July 1, 1852, 1 Macq. 228.

[3] Chalmers, Dec. 15, 1733 (14044), and Elch. Proof, 1.

[4] Mar. 24, 1740, 1 Cr. and St. 267.

trine, that "the testimony of witnesses, on points where a proof by witnesses may be received, is also sustained in any after process, with this proviso or restriction, that the party against whom such evidence is brought, may be admitted to offer objections against the hability or competency of the witnesses."[1]

727. It will be observed, however, that the power of resorting to written depositions, previously taken, in whatever form, has been greatly abridged since the introduction of civil jury trial; as parol evidence on which the jury are to proceed, requires to be given by witnesses, who are examined in their own presence, except in certain specified cases of exemption. The precise effect of the consent, by parties-submitters, to the subsequent use of proof, led in a submission, does not appear to have been determined in any modern case. But if it merely imports what is suggested in the Theory of Conveyancing (*supra*, sec. 720), it would follow that the same rules which, at a jury trial, limit the use of written depositions previously taken in a process in Court, will equally limit their use when they have been taken in an expired submission. Generally speaking, therefore, where a witness, who had been examined in a submission, remained alive, and was able to attend the Court when a jury trial came on, in a process in which the same evidence was wanted, he would require again to give his evidence, on oath, under the eye of the jury. But if the witness were dead, it would appear that his deposition, regularly emitted in a submission between the same parties, and relative to the same matters, would be received at a jury trial, on its being proved to have been taken down[2] as it was emitted by him. Even the spoken words of a person deceased are generally admissible in evidence by the law of Scotland; *a fortiori*, should such written deposition be admissible. It had been emitted under conditions which were favourable to the expiscation of truth, and which tended to exclude any "presumption that it does not give a proper reflex of the mind of the party who made the statement."[3]

728. In one case, in which an arbiter gave an award against an heir, as liable for the debt of his ancestor, the heir brought an action of relief against the executor, as the proper debtor. In support of this action, the heir produced the award, and also the proof which had been led in the submission, as well as in a prior abortive submission, which had come to an end by his father's death; and likewise the proof in some incomplete legal procedure,—all relating to the same debt, and between the same parties, or their representatives.

[1] 4 Ersk. 3. 36.

[2] For the rules regarding the reception of the depositions of dead or absent parties, see Macfarlane's Practice of the Jury Court, pp. 186-191; 2 Dickson 959 *et seq.*, [2d ed., p. 1133]; Clelland, Nov. 12, 1847, 10 D. 40.

[3] Per L. Pres. M'Neill, in Geils, Feb. 10, 1855, 17 D. 404.

The executor objected that the award and the proof could not support the present action of relief, being *res inter alios*, so far as regarded the executor, who had been no party to them. The Court, however, "found the pursuer entitled to relief of the sums contained in the decreet-arbitral, unless the defender could prove collusion in taking of the proof, or bring any other relevant objection, whereby the sums claimed by the Earl of Aboyne (the creditor of the common ancestor) might be brought lower than those contained in the decreet-arbitral; reserving liberty to the defender to re-examine such of the witnesses adduced in either proof as were yet living."

729. The case was between the then Duke of Gordon, as heir of the last Duke, and his Grace's sister, Lady Henrietta Gordon, executrix of her father. In reporting the case, Kilkerran observes, regarding the above judgment: "This was by some thought hard." "Where a debt is constituted against the heir, only by a proof by witnesses, it was thought hard that the executor should be at all bound to submit to that proof; and that, both in point of principle, as such proof, as to him, is *res inter alios acta;* and in point of expediency, as there may be collusion, which the executor may not have it in his power to discover."[1] Perhaps it may be assumed that the objections stated by Kilkerran would receive full consideration, if a similar question were to call for determination at the present day. The Court, indeed, treated the case as in so far special, that "the condition of the parties, and the circumstances of the case, did here exclude all suspicion of collusion; and that, by the proof, a much greater balance (of debt) had come out, than was decerned by the decreet-arbitral, which justified the submission to have been a rational act on the part of the Duke. The Lords, on these equitable considerations, found as above."

730. When minutes of procedure in a submission are produced in an after process, it will be observed that any extract by the clerk to the submission would be regarded in the light of a mere copy, and therefore improbative. The originals require to be produced; seeing that an arbiter has no jurisdiction, and his clerk is not a clerk of court.[2]

731. There is one case of an abortive submission, followed by a legal process between one of the parties and the representative of the other, in which the report bears, in general terms, that "the Lords found that neither interlocutors, concessions, nor minutes before the arbiters, were probative or binding; but that (the party) Mr. Sochan's

[1] D. of Gordon, Nov. 2, 1748 (14045).

[2] Mathers, Dec. 26, 1849, 12 D. 433. This case related to the minutes of a Free Kirk session; but on the present question, these are *in pari casu* with the minutes in a submission. See, in the same report, the necessity for the clerk to have been present at any meeting, the minute of which (setting forth the *res gesta*) he is called to support. See, in connection with this subject, Sturrock, Nov. 23, 1849, 12 D. 166.

oath doth prove *contra deferentem*, as well as against the deponent, because of the sacredness of an oath."[1] The continuing effect of an oath of reference has been already noticed."[2] All mere "interlocutors," by arbiters in an abortive submission, would seem necessarily to fall, as parts of the fallen submission, which could not be contemplated to possess any independent vitality.[3] But, so far as regards "concessions," which may have been made in writing, if duly signed by the parties, or "minutes" recording certain *res gestæ*, if duly made by the clerk to the submission, present at the procedure which these minutes record, it may be doubted whether any general rule could be laid down, as always applying to them. It would rather appear that, in every particular instance, the effect due to such writings would depend on special circumstances, requiring to be weighed in each individual case.

CHAPTER IX.

PROCEDURE REQUISITE FOR ENFORCING THE ATTENDANCE OF WITNESSES BEFORE THE ARBITER.

732. As arbiters possess no jurisdiction of their own, and no authority save what they derive from the parties-submitters, they cannot grant an effectual warrant to cite witnesses or havers to appear and depone, or produce, before them. But, to remedy this want of inherent power in them, the Court has, from early times, interponed its own authority in aid of a submission, on the application of the arbiters, or of either of the parties, when it was found that witnesses or havers declined to attend and be examined in obedience to the arbiter's order. Accordingly, as far back as the seventeenth century, it appears that, on the application of arbiters by Bill (petition), the Court granted warrant to them to summon witnesses to compear and depone before them, in the cause in which they were arbiters.[4]

733. Again, on the application of one of the parties to a pending submission, setting forth that there were papers in the hands of third parties, which it was necessary to recover and lay before the arbiters, and craving a diligence, by horning, to cause them to exhibit those papers, "the Lords, considering that all methods should be used for

[1] Sochan, Nov. 30, 1709 (14034).

[2] *Supra*, sec. 723.

[3] Wauchope, April 10, 1774, 2 Paton 338.

[4] Ker, Jan. 6, 1670 (634); 4 Ersk. 3. 31. [In statutory railway arbitrations the arbitrators or the umpire are empowered to grant diligence for the recovery of documents and for the citation of witnesses. 22 & 23 Vict. c. 59, sect. 18.].

facilitating the extinguishing and stopping of pleas, granted the desire of the Bill."[1]

734. It has been observed by Kilkerran, that the Court only grant warrant to cite witnesses living "in the same shire," to appear before arbiters. If they lived in a different shire from that of the arbiters, then diligence was granted to cite them "to appear before any commissioner, to be named by the arbiters."[2] Where, however, the matter in dispute is of such a nature that the evidence should be led, if possible, on the spot, it would appear that diligence will be granted for citing witnesses to appear before the arbiter, though they live in a different county.[3]

735. The application for a warrant to cite witnesses and havers, when addressed to the Court of Session, must be made in the form of a petition to the Court, and not by bill for letters of supplement in the Bill Chamber.[4] Such letters issue in aid of an inferior court which possesses public jurisdiction, though of a limited character, but were held inapplicable to an arbiter, who is merely a private person, having no jurisdiction to be supplemented. Where the witnesses and havers reside within Scotland, the application for the warrant may equally be made to the Sheriff, as judge-ordinary.[5]

736. When the application to the Court is not made by the arbiter himself, but by a party, it is usual that it should be supported by a recommendation from the arbiter, so as to certiorate the Court that he approves of the proceeding. Such a recommendation is often embodied by the arbiter in his interlocutor allowing a proof. But even if any express recommendation on his part were omitted, it would appear not to be material, because the fact of his having allowed a proof necessarily implies his support of any requisite application to the Court for authority to cite witnesses and havers.

737. When a witness or haver, while under examination, disobeys the arbiter's order, by refusing to give an answer to a question, or to produce a document that is called for, the arbiter possesses no authority of his own whereby to enforce his order. It is necessary, therefore, that the party shall present a petition to the Court, setting forth the circumstances, and in particular the precise order which has been

[1] Stevenson, June 26, 1696 (634); 4 Ersk. 3. 31.

[2] Gordon, July 16, 1741 (634).

[3] This seems to be the purport of the following excerpt, contained in the Synopsis appended to Parker's Notes on Arbn., xiii. 39: "Upon cause shown, such as a dispute concerning marches, the Lords will grant diligence against witnesses, etc., in a different county."—Feb. 15, 1771, Campbell, of Southhall, supplicant. "Tait's MSS. (Lord President Hope's.)" [Caird, June 1, 1865, 3 Macph. 851.]

[4] Harvey, July 7, 1826, 4 S. 816. See Appendix.

[5] Blaikies, Mar. 2, 1852, 14 D. 590. "Such a course is of ordinary practice, and has been repeatedly sanctioned."—Per L. Rutherfurd, Ordinary, in note to interlocutor, *ibid.* See also 4 Ersk. 3. 31, note 183, Ivory's edition.

disobeyed. The petition, which is of a summary character, will then crave service on the recusant witness or haver, and on the other party, and an order for answers. It will then pray the Court, with or without answers, to ordain the recusant witness or haver to answer the question, or to make the production, as ordered by the arbiter; and, in the event of the witness or haver failing to obey the order, when it shall have been pronounced by the Court, to grant warrant to apprehend and incarcerate him until he shall obtemper said order. Under such a petition, all that the recusant witness or haver (or the party supporting him) is called on to do, in the first instance, is to state why the arbiter's order was not obeyed. If he satisfies the Court that there was good ground for refusing obedience, the Court will grant no compulsitor to enforce his compliance with the arbiter's order. But if the Court are satisfied that he ought to have obeyed that order, then they will specially ordain him to do so. If he shall thereafter still refuse, his refusal will infer a contempt of the authority of the Court; whereupon warrant of imprisonment will be granted against him until he shall purge his contempt by obedience, just as would be done in the case of a similar contempt of Court, shown by wilfully disobeying an order made in any ordinary process, originating and depending before the Court.[1]

738. Accordingly, where a haver, who was duly cited under warrant of the Sheriff, refused, in respect of the plea of confidentiality, to obey the arbiter's order by producing certain documents which were called for, the party who cited him presented a summary petition, of the above tenor, to the Sheriff. He stated the circumstances, and quoted, in the petition, the arbiter's orders which were disobeyed, and which he (petitioner) wished to enforce. He prayed the Sheriff to appoint answers, and thereafter to interpone his authority, and ordain the haver "to implement the orders, and to produce the writings called for by the petitioner, and ordained by the arbiter, in his orders foresaid, to be produced by him, and that within a short time; and failing production of the said writs, to grant warrant to apprehend and incarcerate the said (haver) until he shall produce the same; or to do otherwise," etc. Appearance was made both for the opposite party in the submission, and for the haver; and a record was made up. The Sheriff dismissed the petition; but, in an advocation, L. Rutherfurd, Ordinary, remitted, with instructions to recall the interlocutor, "and to proceed to dispose of said petition, on the merits, as accords of law, and as he shall think just." The Court adhered. It was held that the Sheriff had regularly granted a diligence, which was in the course of being executed, when, as alleged by the petitioner in his application, it was unduly obstructed by the haver's refusal to give up certain documents which had been called

[1] Blaikies, Mar. 2, 1852, 14 D. 590.

for, and which the arbiter ordained him to produce. In these circumstances, it was the duty of the Sheriff to examine into the merits of that application. If it appeared to him that the haver had no good ground for refusing to produce the documents in question, then he should ordain the haver to produce. And if the haver should disobey this order, it would then be for the Sheriff to enforce his own authority by the imprisonment of the haver, as in any other case of a contempt of Court, by a haver refusing to make a production, when ordered to do so in any ordinary process.

739. When it proves necessary, in the course of a submission, to examine witnesses or havers who reside in England or Ireland, the arbiter may name one or more commissioners for taking such examination, and on his respectful recommendation to the Court of Session to sanction this procedure, the party concerned may petition the Court to sanction and confirm the appointment of the commissioners named by the arbiter, and to grant warrant for letters of diligence to cite witnesses or havers to appear before the commissioners, and to depone or produce as required. Notwithstanding opposition, the Court will grant the prayer of the petition, if they think it well founded, and will interpone their authority and confirm the arbiter's appointment of commissioners, and grant warrant for letters of diligence accordingly.

740. This course was followed by the Court in a recent case,[1] in which the arbiter granted a commission for examining witnesses in England. He did so by an interlocutor in the following terms:—"Appoints the mayor or town-clerk of Birmingham, his (the arbiter's) commissioner in Birmingham (and certain other persons, his commissioners in London), for taking the depositions of havers resident in these places, in terms of the specifications formerly lodged, etc.; and the arbiter respectfully recommends to the Lords of Council and Session to grant letters of diligence, in terms of said specifications; to sanction and confirm the appointment of the said commissioners named by the arbiter; and to require and enforce the attendance of havers before the said commissioners." The parties suing out the commission then presented a petition to the Court of Session, "to sanction and confirm the appointment of the commissioners named by the arbiter, and to grant warrant for letters of diligence at the petitioner's instance, for citing havers, and particularly for citing (certain persons specified) to appear before the said commissioners, or one or other of them, and to produce such writings, falling under the said specification, as they may respectively have in their custody or possession."

741. The petition founded specially on 6 and 7 Vict. cap. 82,

[1] Blaikies, July 8, 1851, 13 D. 1307. [Highland Rail. Co. v. Mitchell, May 30, 1868, 6 Macph. 896.]

"for amending the law relating to commissions for the examination of witnesses." The Act provides for the effectual execution, within England, Scotland, or Ireland, respectively, of any commission which has been issued by the Courts of a part of the realm, different from that in which the commission is to be executed. It enacts (sec. 5) that, after certain written notice has been served on a witness to attend the commissioner, if the person so served shall fail to appear, and such failure be duly certified, it shall be lawful to any one of the Judges of the Superior Courts of law in that part of the United Kingdom, on the application of the party who has sued out the commission, to enforce the attendance and examination of such witness, or the production of the documents called for. The respondents made appearance to resist the petition as incompetent, and otherwise. The Court held it competent, and pronounced an interlocutor, by which they "interpone their authority, sanction and confirm the appointment of the commissioners named by the arbiter, and grant warrant for letters of diligence at the petitioner's instance, as prayed for." This diligence was enforced in England by Mr. Justice Patteson, after hearing parties.

CHAPTER X.

ACTION AND DILIGENCE UPON AN AWARD.

742. As an arbiter possesses no jurisdiction,[1] the decernitures contained in his award derive their whole efficacy from the obligation by which the parties, in their contract of submission, bind themselves to fulfil his sentence. Taken along with the submission, the award has precisely the force of a written contract. If, therefore, either party refuses to fulfil his obligation in terms of his contract, by implementing the award, the other party may found an ordinary action upon it, in which, if no sufficient objection be stated against the award itself, the Court will give decree, ordaining the defender to implement the award. Upon this decree of the Court the same diligence may be raised as upon any other decree by which a defender is ordained to fulfil any obligation which he has undertaken.[2]

743. It is common, however, for parties, in the contract of submission, to consent to the registration of the submission (with any prorogation or devolution thereof), and of the award, for execution. Under such a submission, as soon as an award shall be pronounced, it may be put on record, along with the submission containing the consent to

[1] "Quia, licet arbitria sunt instar judiciorum, tamen arbiter nullam censetur habere jurisdictionem."

[2] 4 Ersk. 3. 31.

registration; and an extract decree of registration will be obtained, on which the usual summary diligence may be raised,[1] just as in the case of any ordinary bond containing a clause of registration.

744. It is essential that the consent to registration should not be restricted to the contract of submission itself, but should also apply to the award. Where the consent of the parties did not extend to the award, it was held that summary diligence could not be raised upon the award, although the arbiters had authorised its registration, and it had been registered accordingly. The consent, upon which a registration for summary diligence against any party is to follow, must be the consent of that party himself,[2] and not of the arbiter merely, or of any other third party whatever. In the case of recording an interim award, in order to raise diligence thereon, the submission requires to be recorded along with it, just as in the case of a final award. If it becomes necessary for the arbiter, after the submission has been engrossed in the books, to recover possession of the principal submission for a time, he can accomplish this only by applying to the Court for a warrant on the keeper of the record. But for the space of six months after the submission has been given in to be recorded in the Books of Council and Session, the arbiter can borrow it up, on his own receipt, if it still remains unrecorded.[3]

745. The consent to register the award may be adhibited by the parties, if they choose, at any time pending the submission, where it has been omitted to insert that consent in the contract of submission itself.[4] The most convenient form of thus adhibiting their consent would appear to be by a minute, signed by the parties, and indorsed on the submission. But it might equally be done by a separate and probative minute, which sufficiently referred, *in gremio*, to the submission, so as to make it certain that the consent to registration applied to the award which was to follow under that individual deed.

746. Where the consent to registration, as given in the submission, authorises a charge upon the short *induciæ* of six days, which is the usual style in such cases, it is not necessary that the award itself should expressly repeat that a charge may be given on the same short *induciæ*. Though the award uses the general terms, "in form as effeirs," these words are read along with the consent, as given in the submission, and a charge on six days' *induciæ* may competently be given.[5] So also, where the consent to registration, as given in the submission, authorised a charge on six days, but only applied to the registration of the submission, and not of the award, and a relative

[1] 4 Ersk. 3. 31.

[2] Knox, Mar. 12, 1707 (625).

[3] 1685, c. 38; Scott's Manuals of Periods of Time, p. 62; Parker, p. 262, who adds that an extract of the submission is also deposited with the keeper of the record.

[4] Baillie, May 19, 1829, 7 S. 619.

[5] Balfour, Jan. 17, 1706 (6861).

minute was subsequently signed by the parties consenting to the registration of the award, "that letters of horning pass, and be direct thereon in common form;" it was held that, reading together the submission and the relative minute, a charge on six days was warrantably given upon the registered award. The suspender pleaded that the only consent applicable to the award expressly sanctioned a charge "in common form," which meant the common-law *induciæ* of fifteen days.[1] But the Court repelled the plea.[2]

747. In order to warrant the issuing of diligence upon an award against an individual, it is requisite that he appear to be, *ex facie*, a party to the submission. Muirhead was proprietor of the estate of Bredisholm, and Monteath was his factor. A tenant on the estate claimed damages from Muirhead, and a submission was entered into in the following terms:—"We, James Monteath, factor on the estate of Bredisholm, and Robert Stevenson, tenant in the farms of Braehead, etc., on said estate, hereby submit and refer," to certain arbiters and an oversman, "the claims of the said Robert Stevenson for injury done to his said farms by the operations of the coal tenant or subtenants on the estate of Bredisholm," etc.: "and we, the said parties, hereby bind and oblige ourselves to abide by, implement, and fulfil the award of the said referees or oversman, and to hold such decision as final and binding on us." Under this submission an award was pronounced, which decerned directly against Muirhead, the proprietor, for payment of certain sums. Letters of arrestment were obtained upon the award, and arrestments were used in the hands of Muirhead's tenants. These arrestments were recalled by the Court, on the ground, *inter alia*, that Monteath, the factor, was the sole party in the submission, and had only bound himself by its terms.[3]

748. In one case, however, it appears that summary diligence upon an award was held to be well raised against a person who was not a party to the original contract of submission. But the circumstances were very peculiar. A widow entered into a submission with a creditor of her deceased husband. After the submission was in dependence, a party, who had been appointed factor *loco tutoris* to the children of the deceased, signed a minute, and lodged it in the submission, by which he expressly agreed, "on behalf of the children, as factor foresaid, to the terms of the foregoing submission, and bound and obliged himself to abide by the award" to be pronounced. He thereafter lodged joint pleadings along with the widow; and as it had been accidentally omitted in the submission to consent to the registration of the award,

[1] "Now limited by 13 & 14 Vict. c. 36, sec. 21, to fourteen days, in charge upon signet letters."—Menz. Lect., p. 160, [3d ed., 165. The *induciæ* on such charges are further reduced to seven days by the Court of Session Act (1868), 31 & 32 Vict. c. 100, sec. 14].

[2] Baillie, May 19, 1829, 7 S. 619.

[3] Muirhead, Feb. 19, 1848, 10 D. 748; and Session Papers.

as well as of the submission, the whole parties, both the original parties to the submission and the factor, signed another minute, in which they designed themselves "parties-submitters," and consented to the registration of the award. They also, at the request of the oversman, signed an agreement to allow him a suitable remuneration for his trouble.[1] An award being thereafter pronounced, which contained decernitures against the foresaid party, as factor *loco tutoris*, he presented a bill of suspension, on the ground, *inter alia*, that as he was not a party to the original contract of submission, it was incompetent to pronounce direct decernitures against him; and, at all events, there was no foundation for summary diligence. The suspension was unanimously refused.[2]

749. It appears from the Session Papers, that the minute which consented to the registration of the award, contained no consent to the registration of the minute itself. The award had ordained the minute to be recorded along with the submission and award. Upon this a plea was founded by the suspender, to the effect that the arbiter had no authority to ordain the registration of the minute; and that, unless the minute was registered, there was no warrant, *ex facie* of the procedure, for registering the award. This plea was repelled. It was also pleaded by the suspender, that the first minute, by which he had become connected with the submission, contained no consent to the registration of itself; and therefore the award was unwarrantable, in ordaining that minute to be registered. It was answered, that the minute expressly referred to the submission, and agreed to its whole terms, including, of course, the consent to registration, which the submission contained; and having truly become part and parcel of the submission, it was affected with the consent to registration equally with the rest of the submission. This plea of the suspender was likewise repelled. It may be noticed also, that there must have been a devolution executed, as the award was pronounced by an oversman. Neither the submission nor the minutes contained any special consent to the registration of the devolution. No plea was founded on that circumstance by the suspender; but the respondent apparently assumed, *arguendo*, that a devolution or prorogation could competently be registered, without any special consent beyond that to register the submission and the award. In fact, the prorogation of a submission, and the devolution of it, when duly authorised by the submission, are merely pertinents, so to say, of the submission itself; the former prolonging the term of its duration, and the latter propelling it to the oversman, in both cases, by the exercise of powers contained *in gremio* of the submission itself.

750. An award in a submission, to which a tutor is a party, will not warrant a summary charge against a pupil on reaching puberty

[1] The oversman did not eventually decern for any sum in his own favour.

[2] Baillie, May 19, 1829, 7 S. 619.

or majority, but only an ordinary action to have him decerned to implement and fulfil the award.[1]

751. It would appear, from the case of Muirhead (sec. 747), that several of the Judges, adverting to an alleged practice in the Bill Chamber, doubted much whether it was enough to produce there the award alone, without also producing the submission when craving a warrant for raising diligence upon it. L. J. Clerk Hope observed, that "a decree-arbitral is not like a decree of this Court—it is necessary to show authority for it. It is a very loose mode of proceeding, if nothing but the decreet-arbitral is required in the Bill Chamber, and I am not disposed to attach much weight to the mere practice in a point like this." It would seem proper, therefore, in all cases, to produce an extract-submission, as well as an extract-award or decreet-arbitral, in the Bill-Chamber. And as all the procedure on which summary diligence is to be immediately based, should be *ex facie* regular, it is believed to be the practice to make production in the Bill-Chamber, of any prorogations, and also of any devolution of the submission which may have taken place. Without the prorogations, it does not appear, *ex facie* of the procedure, that the submission was still in force at the date of pronouncing the award. Without the devolution, it does not appear, *ex facie* of the proceedings, that the oversman had any authority to act.[2]

752. Where the objections, upon which the challenge of an award is founded, are either admitted or are apparent, *ex facie* of the procedure, it is competent to state them in a summary form, and without recourse to a reduction. They may be stated in a suspension of a charge upon the award, or as a defence, pleaded *ope exceptionis*, against an action raised for implement of the award. But where the objections are extrinsic of the award, and can only be established by means of a proof, it is necessary to raise a reduction of the award, in order to bring it relevantly under challenge.

753. An action was raised against two parties for payment of expenses, which had been personally awarded against them by the arbiter. They stated, in defence, that they had merely sisted themselves, successively, in the submission, in the special character of trustee of one of the parties, and that they could therefore only be decerned against in that limited character. As the grounds of this defence appeared *ex facie* of procedure, they contended that they were entitled to state it summarily. The L. Ordinary, Medwyn, found it "not incumbent on the defenders to institute a process of reduction, in order to establish their defence, that, in the decree-arbitral, the arbiter has exceeded his powers, by giving a personal

[1] Ayton, Jan. 18, 1711 (14997).

[2] The "prorogations" "should all be recorded with the submission."—Russell's "Theory of Conveyancing," 119.

decree against them; and in respect that, by the said decree, there is a personal decerniture against them, when they sisted themselves as parties, the one only in the character of voluntary trustee, and the other in the character of statutory trustee," assoilzied the defenders. The Court adhered. Apparently their Lordships' opinions had not been delivered at length; but the L. Ordinary, in a note to his interlocutor, observed, as to the question, "whether the defence can be received by way of exception or reduction:" "If the objection to a decree-arbitral is forgery, fraud, corruption, or any other objection which is extrinsic, not appearing from the terms of the decree itself, which is in all respects formal; and where extraneous evidence is to be adduced to support the objection; a process of reduction is necessary. But where the objections are not of that character, and are to be proved from the terms of the decree itself, the same have often been discussed by the Court, as reasons of suspension merely. No doubt, it most commonly has happened, that these grounds of suspension have not been sustained; as in Cockburn, Jan. 31, 1724 (640); Gardner, Jan. 19, 1773 (659); Robertson, June 20, 1783 (653); Baillie, May 19, 1829, 7 S. 619; at the same time they were discussed in that form. However, in Dunsmoir and Finlay, July 30, 1745 (656), the reasons of suspension were sustained by the first interlocutor, though they were afterwards repelled; and also in Grosat, Jan. 24, 1739 (626), and in Heriot, Jan. 20, 1780 (661), and in Maitland, May 18, 1796 (641), the objections were sustained to the decree-arbitral, and they were pleaded by suspension. The last case, in particular, is a strong case in support of the opinion that the objection in the present case may be pleaded by way of exception, without any formal reduction."[1]

754. Where the circumstances of a particular case appeared to be sufficiently strong to call for such an interposition, the Court required caution to be found by a charger, who was in embarrassed circumstances, to repeat, in the event of an award being reduced, before they refused a bill of suspension, which was presented, of the charge upon an award.[2]

755. In another case, in which an interim-award had become final,

[1] Whitehead, Nov. 16, 1833, F. C. See also Deas, May 25, 1821, 1 S. 29; Langmuir, May 21, 1840, 2 D. 877; note to interlocutor of L. Ordinary, in Robertson, May 30, 1833, 11 S. 659. It may, perhaps, be noticed, with respect to the case of Whitehead, that the plea of a trustee's want of trust-funds has been repeatedly overruled when stated as an objection to a decerniture against him *qua* trustee. But it has been pleaded, that a decerniture against him, *privato nomine*, might operate prejudicially against him when claiming relief against the trust-funds; thereby giving him an interest (where there were trust-funds) to object to any decerniture not directed against him *qua* trustee only.—See Gibson, May 25, 1833, 11 S. 656; Clyne's Trustees, Feb. 8, 1840, 2 D. 554; Torbet, Feb. 23, 1849, 11 D. 694; Beadie, June 21, 1850, 12 D. 1069.

[2] Hood, Dec. 13, 1832, 11 S. 207.

through the expiry of the submission, and a charge was given on it, a bill of suspension was presented, *inter alia*, on the ground that the suspender was the creditor of the charger to a larger amount than was contained in the interim-award; but that, by the expiry of the award, the arbiter had been prevented from deciding on his claims. The Court, in the circumstances, passed the bill on caution; and, in the event of caution not being found within the time limited, "prohibit the clerk from issuing a certificate of no caution, until a bond of caution shall be lodged by the chargers, that they will repay the sum for which caution is required, in the event the same shall be paid to them, in consequence of the diligence being carried into effect, and its being afterwards found that such sums were not due."[1]

756. There is one case, in which the Court applied a certain control to the exercise of the power of registration, under the consent in the registration clause of the submission. The circumstances were very peculiar. The submission involved not only pecuniary claims, but also questions of personal character and feeling. The object of one of the parties, in resorting to the tribunal of the arbiter, was to avoid the inevitable publicity of judicial proceedings. The submission contained a clause consenting to registration in the usual terms. The proceedings issued in an award, by which the only pecuniary claims remaining unsatisfied were found to be due to the party whose object it was to keep the procedure private. The award and submission were delivered by the arbiter's directions to this party. The opposite party then petitioned the Sheriff for delivery of these documents to him, so that he might put them on record and obtain extracts. The holder of the documents answered, that he would give every facility for full inspection of them, so as to enable the petitioner to bring a reduction of the award, if so advised; but he contended that, as the registration clause had been inserted in the submission only with a view to execution, if that should be necessary; and, as he himself was the only creditor under the award, he was entitled to object to the registration of documents which would be painful and offensive to him, unless the petitioner could qualify some substantial interest which entitled him to insist on registration. In an advocation, the Court, though holding the case to be attended with difficulty, adopted this view, and refused to order the documents to be delivered up to the petitioner.

[1] Taylor, Jan. 19, 1822, 1 S. 240.
[2] Dickson, Dec. 1, 1830, 9 S. 100.

CHAPTER XI.

STAMPS REQUISITE ON ARBITRATION PROCEDURE.

757. As a simple submission is merely an agreement or contract, by which parties oblige themselves to abide by the award of an arbiter, the "Agreement" stamp applies to it[1] where it contains no clause of registration. Where it contains a clause of registration, the "Deed" stamp of £1, 15s. appears to apply, under the general provision which annexes that stamp to a "deed of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty."[2]

758. Where the subject-matter of a submission, which is liable to the agreement stamp, and is dated on or after April 3, 1860,[3] is of the value of £5, or upwards, a stamp of 6d. is necessary; below that value no stamp is required.

759. Under a former Stamp Act, 55 Geo. III. c. 184, an Agreement stamp was only requisite where the matter thereof was of the value of £20 or upwards. Under that Act it was held in England, that "an agreement of reference of all matters of difference in a cause does not require a stamp, when it does not appear that the matter of the agreement is of the value of £20." Per Erle, J.: "It does not appear, for certain, that this was an agreement concerning a matter of the value of £20."[4] This seems to throw upon the party who alleges that any submission requires to be stamped, the *onus* of satisfying the Court that it is concerning a matter of the value, at least, of the lowest sum which the Act has made subject to an agreement stamp. Under the recent Act, that value is carried as low as £5.[5]

[1] In an early case, it appears that "in a question, if submissions fall under the Stamp Act, it was urged that a decreet-arbitral needs not be stamped, being a quasi-judicial act; but a submission is a contract, and ought to be stamped, as much as any other contract. The Lords found that submissions are comprehended under the Act."—Crawford, Jan. 1, 1726 (16932). 23 Vict. c. 15; [repealed by 33 & 34 Vict. c. 99].

[2] 55 Geo. III. c. 184, Sched., P. 1, "Deed;" [repealed by 33 & 34 Vict. c. 99. A "deed" stamp of 10s. only is now necessary. Stamp Act (1870), 33 & 34 Vict. c. 97.]

[3] Before that date the Agreement Stamp was 2s. 6d., where the subject-matter was of the value of £20, or upwards. See 7 Vict. c. 21, sec. 5, and Sched.; [also repealed by 33 & 34 Vict. c. 99. Agreements, however long, now require a 6d. stamp only; if their subject-matter be under the value of £5, they are exempt from duty. Stamp Act, 1870.]

[4] Lloyd, Jan. 31, 1850, 19 L. J. (Q. B.) 192.

[5] [23 Vict. c. 15; repealed by 33 & 34 Vict. c. 99].

760. It has also been held in England, that, "if, at the time of making an agreement, the subject-matter of it does not appear to be of the value of £20, a stamp does not become necessary, merely because the value, as subsequently ascertained, a little exceeds that amount."[1] The value, as it turned out in that case, was £20, 7s. 7½d. Under the recent Act, the limit of value, as already noticed, which is free of stamp-duty, is below £5. As the Stamp Acts, with respect to Agreements, apply equally to England and Scotland, it may probably be expected that a similar rule would be followed here.[2]

761. A submission is sometimes constituted by a correspondence, consisting of a series of letters.[3] It will be observed, with respect to the requisite stamp, that when these letters may be produced in evidence to prove a submission between the writers of the letters, it is "sufficient if any of such letters shall be stamped with a duty of one shilling, although the same shall, in the whole, contain any quantity of words exceeding 2160."[4]

762. It would appear that one stamp is enough, although there are several parties-submitters, having separate legal interests, provided that they have a sufficient community of interest in the subject-matter of the reference; as in the case of a submission between the party who has insured a ship and the underwriters on the policy.[5]

763. Though the submission may not have been originally written on stamped paper, a stamp may effectually be adhibited to it afterwards when required, on payment of the original duty, which ought to have been affixed to it, and a penalty of £10.[6]

764. If the submission be an Agreement, liable to one duty of 6d., and be brought to the head offices of London or Edinburgh, or to a distributor of stamps, within fourteen days of its date, it will be stamped without penalty. But if it be only brought after that time, or be liable to more than one duty of 6d., it will fall under the general rule, according to which, when any instrument is brought to the Commissioners of Inland Revenue within twelve months of the date of its

[1] Liddiard, Jan. 31, 1850, 19 L. J. (Exch.) 160.

[2] See Tilsley, Dig. of Stamp Acts (ed. 1860), p. 7; and (ed. 1853) pp. 37 and 928; [3d ed. (1871), p. 11 *et seq.*]

[3] See an instance of this in Maclellan, July 9, 1830, 4 W. & S. 157.

[4] 23 Vict. c. 15, [now repealed]. As to the use of adhesive stamps, see 23 & 24 Vict. c. 111, sec. 12, [and 33 & 34 Vict. c. 97 (Stamp Act, 1870), secs. 24, 25, etc.—Tilsley, 3d ed., p. 1.]

[5] This has been so held in England, in determining on the liability of a submission to stamp duty.—Russ. 52, [4th ed., 47.] See also Johnston, Mar. 7, 1801 (Dicty. Writ. Appx. 5).

[6] See opinions in Paterson, May 15, 1829, 7 S. 616. See 13 & 14 Vict. c. 97, sec. 12; [repealed by 33 & 34 Vict. c. 99. The penalty for after-stamping is, however, still £10. Stamp Act, 1870, sec. 15.]

execution, and they are satisfied that the original want of a sufficient stamp arose from "accident, mistake, or urgent necessity, and without any wilful design or intention to defraud" the Crown of the duty, or to evade or delay payment thereof, they may remit the whole or any part of the penalty, payable on stamping it.[1] The commissioners exercise this power by stamping instruments (not being Agreements liable to one duty of 6d.) at any time, within two months of their date, without exacting any penalty. After two months the penalty, as a general rule, is exacted.[2]

765. It is not necessary that the minute of prorogation of a submission, when executed by arbiters, in virtue of powers contained in the submission, should be written on stamped paper. This is in accordance with constant practice, and also with principle. The Stamp Acts have not specially attached any duty to an act of prorogation, as they have done to an award. A submission, when prorogated by the arbiters, remains still the same original contract of parties, as it was at first. It has, indeed, been prevented from falling through the lapse of the term which was particularised in the submission as its commencing term. But that particular term was only so specified, as alternative with any other term or terms, to which the arbiters might think fit to prorogate the submission. The prorogated submission, therefore, is no new contract or agreement of parties in any respect. And the arbiter's mere exercise of the power of prorogation has no more been made the subject of a stamp duty, than his exercise of the power of ordering a hearing or a proof.

766. But even in the different and stronger case, in which a submission had not originally conferred a power of prorogation upon the arbiters, and where, therefore, the prorogation was executed, and could only be executed, by the parties themselves, the Court unanimously intimated opinions, and appear to have virtually decided, that no new stamp was necessary, although it was expressly pleaded, that such an act of prorogation was, in fact, a new agreement by the parties.

767. In a reduction of an oversman's award, pronounced under a prorogated submission, the prorogation was challenged for want of a stamp. The L. Ordinary, Newton (2), and afterwards the Court, intimated the opinion, "that prorogations did not require a new stamp; or, at any rate, if they did, that the want of it was not a ground of reduction, seeing it might still be supplied on payment of the penalty." The interlocutor, assoilzieing the defender from the action of reduction, did not contain any formal finding on the subject of the unstamped

[1] 13 & 14 Vict. c. 97, sec. 12; [repealed; see previous note].

[2] The statement as to practice is made after careful inquiry on the subject.

prorogation. But as the prorogation, if it had been held to require a stamp, could not have been read by the Court; and as the award (so long as the prorogation could not be read) was *ex facie* pronounced after the expiry of the submission, it would seem that the Court, in sustaining the award, must have read and founded on the prorogation, and must, accordingly, have held that it required no stamp, and have given a judgment which truly involved the decision of that point. It should be noticed, however, that the act of prorogation was executed during the currency of the original submission, which had never been allowed to expire.[1]

768. If it were to be held that the case of Paterson has not settled the point, it might seem to be a question of some nicety, whether a prorogation of a submission, which is executed, not by the arbiters under powers originally conferred in the submission, but by the parties themselves in consequence of no such powers being there, is not a new contract or agreement between the parties, and consequently requires a new stamp. As it can only be executed by recurring to the parties; and, unless they shall *de novo* consent and mutually agree to execute it, it cannot be done; such a proceeding, especially if the original term of the submission has expired, seems to have in it much of the radical elements of a new agreement; and in this light, with respect to the Stamp Act, such procedure appears to have been viewed in England.

769. An arbiter had power to pronounce an award in April; that time passed without an award, and the parties afterwards agreed to enlarge the time to July. This was done by indorsing a minute to that effect upon the arbitration-bond, which was signed by the parties. An objection being afterwards taken, that this was a new agreement between the parties, and required a new stamp, the objection was held good. Tindall, C. J., observed, after reading the indorsement on the bond: "What is this but an agreement to substitute July for April? At all events, it is evidence of an agreement to that effect; and the words of the Stamp Act are wide enough to comprehend such an instrument. 'Agreement, or any minute or memorandum of agreement, whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument.'—55 Geo. III. c. 184. Then, the instrument not being stamped, the plaintiff is out of Court."[2]

770. The minute of devolution of a submission being merely the exercise, by the arbiters, of powers conferred on them in the contract of submission, by which they desist from acting as arbiters, and substitute another person in their room, has not the effect of making any

[1] Paterson, May 15, 1829, 7 S. 616.

[2] Stephens, May 31, 1832, 9 Bingh. 32. The words above quoted, from the former Stamp Act, are repeated in 23 Vict. c. 15, [and in the Stamp Act, 1870.]

new contract or agreement. The devolved submission is the same original contract of submission still. It does not, therefore, require a stamp under the head of agreement; and there is no other head in the Stamp Acts which is applicable to it. The purification of a condition in the original contract has had the effect of sopiting the powers of the arbiters, and of calling into exercise the powers of the oversman; but this is all in terms of the original contract of submission itself.[1]

771. Neither the arbiter's minute of acceptance of his office, nor his appointment of a clerk to the submission, requires to be written on stamped paper. Neither do the minutes of the procedure in the submission require to be written on stamped paper. There appear to be no decisions respecting points so much established in practice.

772. An "award or decreet-arbitral in Scotland" is now chargeable with an *ad valorem* stamp duty, according to "the amount or value of the matter in dispute."[2] [Where the value is under £5, the duty is 3d.; under £10, the duty is 6d.; and so on. Where the value exceeds £1000, and in any other case not above provided for, the duty is £1, 15s.]

773. It would appear, that at one time it was held that an award, when written on the same sheet of paper with the submission, did not require a separate stamp; it being observed by the Court, that "submissions and decrees-arbitral, forming together the essential contract of the parties, have been usually written on the same sheet of paper." Drew, etc., Jan. 31, 1787 (653). But in practice, an award always has the award-stamp affixed to it. It is equally "an award," whether it is written on the same sheet with the submission, or on a separate sheet; and, being "an award," the Stamp Act makes it chargeable with its own appropriate stamp.[3]

774, 775, 776. [The progressive duties payable under 13 & 14 Vict. c. 97, and 23 & 24 Vict. c. 111, of which these three sections formerly treated, have been repealed by 33 & 34 Vict. c. 99.[4]]

777. It would rather appear, that when an award takes the form of an Opinion, given by Counsel upon a joint memorial, submitted to him by parties who have agreed to be bound by his opinion, it has not

[1] In England it has been decided that "the appointment of an umpire, made in writing, by two arbitrators, requires no stamp."—Routledge, Nov. 28, 1812, 4 Taunt. 704. [See also Tilsley, 3d ed., p. 8.]

[2] 23 & 24 Vict. c. 111; [repealed. See Stamp Act, 1870; Schedule, *voce* "Award, or decreet-arbitral, in Scotland."]

[3] See *supra*, sec. 772, as to mode of computing value; see also Tilsley, Dig. of Stamp Acts (ed. 1860), p. 7; and (ed. 1853) pp. 37 and 928; [3d ed. (1871), p. 11, *et seq.*]

[4] [See Tilsley, 3d ed., p. 522.]

been considered that the opinion should be written upon stamped paper. In a recent case, in which an award, which was thus given in the form of an opinion of counsel, was strenuously objected to on other grounds, no plea was raised on the want of a stamp.[1]

778. In England, the Court have inclined to take the same view. Where parties who had a dispute respecting a claim of debt, by the one against the other, agreed "to submit a case to a barrister, and to be bound by his opinion: *Semble*, that in an action, brought to enforce such payment, the opinion of a barrister, upon a Case so submitted, is admissible in evidence without an award stamp." "*Semble*, also, that supposing an award stamp to be necessary, a stamp, proportioned to the number of words in the opinion alone, without the Case, is sufficient, although the opinion be annexed to the Case, and refer to the Case thus—'Upon the facts stated, I am of opinion,'" etc.[2]

779. A judicial reference, with all the procedure therein, forms just a part of a process depending all the while in Court. Since the Act of 5 Geo. IV. c. 41, which abolished the stamp-duties on law proceedings, neither the minute of reference, although it is the equivalent of the ordinary submission, nor the referee's report or award, although it is the equivalent of the ordinary arbiter's award, requires a stamp.[3]

780. Russell observes[4] that, in England, "in order to necessitate an award stamp, the document must strictly be an award." In applying this general rule, there is one exemption from Stamp-duty which has been recognised in England, to which the decisions do not appear to present any parallel in Scotland. "Where, on an agreement between an incoming and outgoing tenant, the valuation of some goods on a farm, and of the repairs, was to be determined by certain referees, an appraisement stamp on the written valuation was held sufficient, under 46 Geo. III. c. 43, and an award stamp was unnecessary, the valuation not being looked on as an award, although in some respects it had the same effect; as, in the opinion of the Court, the parties, in appointing persons to settle the account, had no contemplation of submitting any differences to the award of arbitrators."[5] In a recent case in England, it was stipulated that if a contractor failed to perform his contract within a certain time, he should be liable to pay such sum, not exceeding £300, as liquidated damages, as J. E. should adjudge to be reasonable. In an action to recover

[1] Fraser, July 29, 1850, 7 Bell's App. 171.

[2] Boyd, 1834, 4 Nev. and Man. 99. It was observed by Park, B., *arguendo*, in Sybray, 1836, 1 M. & W. 441: "If two persons agree to refer a case to counsel, and to be bound by his opinion, if the opinion does not contain evidence of the agreement, it is not liable to an award stamp." See also Russ. 249, [4th ed., 240].

[3] See similar rule in England.—Russ. 77, [4th ed., 69].

[4] Russ. 248, [4th ed., 239].

[5] Russ. 248, [4th ed., 239]; Leeds, Jan. 24, 1810, 12 East 1; Perkins, Nov. 10, 1814, 2 Chitt. 399.

the sum which was so adjudged by J. E., an objection was taken, that an award stamp was requisite on J. E.'s adjudication. But it was held "that the adjudication by J. E. was merely an appraisement, and not an award, as to any matter in dispute between the parties."[1] On this subject Tilsley remarks (ed. 1860), p. 9, that, to determine, for the stamp-duty, whether an instrument is an "appraisement" or an "award," is "a point sometimes of difficulty."[2]

781. Up to the value of a subject-matter of £750 [now £500], the duty is now the same on both instruments. But the particular difficulty referred to by Tilsley does not appear to have been raised in Scotland. If the principle of the English cases could be held applicable here, it would appear to affect particularly those ancillary submissions which are inserted in a primary contract, not for the purpose of deciding any disputes between the parties, but for the purpose of liquidating some condition of the primary contract. But it does not appear that such a view has as yet received any countenance from the Court, or has even been raised in discussion. The ordinary term of "decree-arbitral or award," has been regarded as applying, with the same fitness, to the sentence of arbiters,—in fixing a price, for instance, so as to extricate a contract of sale, or in valuing a stock of sheep as between outgoing and incoming tenant,—as to any sentence of arbiters deciding on differences or disputes between parties-submitters. There is, in fact, a "difference" to be decided in the one class of cases as well as in the other. If the buyer and seller did not "differ" about the amount of the just price in a contract of sale, or if the outgoing and incoming tenant did not "differ" in regard to the just value of the stock of sheep, there could have been no need to call in the aid of arbiters. And when arbiters (by whose sentence the parties have bound themselves to abide) determine this "difference" between the parties-submitters, by deciding and awarding what is the just price, or the just valuation (being the matter in issue between the parties), they have hitherto been regarded as exercising therein a proper arbitral function, and as pronouncing a genuine "award."[3]

782. There are several classes of statutory exemptions of submissions and awards from stamp-duty. For example, submissions and awards which "relate solely to the estate of the bankrupt," are exempt from stamp-duty by the Bankrupt Act, 19 and 20 Vict. c. 79, sec. 184; submissions and awards are likewise exempt from duty, in procedure under the Master and Workman Act, 5 Geo. IV. c. 96, sec. 32; under the Savings Banks Act, 7 and 8 Vict. c. 83, sec. 14, etc.

[1] Northampton Gas Light Co., Jan. 18, 1855, 24 L. J. (C. P.) 60.

[2] [See Tilsley, 3d ed. (1871), p. 49, *et seq.*]

[3] [With respect to the stamp-duty on foreign instruments, when used within the United Kingdom, see Stamp Act, 1870, *voce* Mortgage, etc., and secs. 113-115.]

CHAPTER XII.

NON-CONCURRENCE AMONG ARBITERS.

783. WHERE a submission is made to two arbiters, no award can be pronounced by them, unless they concur in opinion. Each of them possesses equal authority; and in so far as they differ, they neutralise each other.[1] Even supposing that no difference of opinion arose between them, but that one of them died or left the country before an award was pronounced, the power of making an award would not accrue to the remaining arbiter, unless it was expressly so provided in the submission. The jurisdiction was delegated to them both jointly; not to either of them separately; and after the failure of one, that conventional tribunal no longer existed, on which alone the arbitral jurisdiction had been conferred.[2]

784. Where more arbiters than two were appointed, and no express power was given to a majority to decide, the law has varied at different periods respecting the necessity of the concurrence of the whole arbiters, or only of a majority of them, in pronouncing the award. By our earlier law, borrowed apparently from the Roman law,[3] it seems to have been competent to a majority of arbiters in such circumstances to pronounce an award.[4] So much would this appear to have been, at one time, the tendency of the law, that an old statute (1426, cap. 87) made express provision that there should always be an odd number of arbiters appointed; and it was declared that, for the future, submissions should be null, unless this condition was complied with.

785. Although the statute has long been in desuetude, it is never-

[1] There appears to have been a remedy for this in the Roman Law: "Usitatum est, etiam in duos compromitti, et debet Prætor cogere arbitros, si non consentiant, tertiam certam eligere personam, cujus auctoritati pareatur." Poth. ad Pand. L. 4. t. 8. sec. 2. art. 2. sec. 12. This is not, however, the law of Scotland. See Merry and Cunningham, June 7, 1860, 22 D. 1148, [and March 26, 1863, 1 Macph., H. L., 14]; disposing of a question which would not have arisen if the arbiters had been compellible to name an oversman.

[2] More, Feb. 10, 1693 (14720).

[3] Debet autem compromitti in numerum imparem, quo numero Deus gaudet; scilicet, ad unum, aut in tres," etc. Sect. 2: "Si contingeret tres non concordare in pronunciando, judicium obtineat, id est, valida sit sententia, reliquorum duorum." —Reg. Maj. L. II. cap. 5, secs. 1 and 2. Though the authenticity of the Books of the Majesty has been seriously impugned, this need not prevent an incidental reference to them, merely for purposes of illustration, especially where they are supported by other authorities. See Voet. ad Pand. L. 4. t. 8. sec. 19.

[4] 4 Ersk. 3. 34; 1 Bankt. 23. 10; Paterson, Mar. 29, 1561 (654); Macmath, Jan. 10, 1624 (14719); Riddel, July 27, 1694 (14720); compared with Sutherland, June 5, 1605 (14719); and Freeland, Feb. 23, 1666 (646). See, in connection with this subject, the anomalous case of Paton, July 7, 1708 (16969).

theless deserving of attention, as a record of the state of the law at the time; for it seems to have contemplated that a majority of arbiters should always have power to decide, unless the unanimity of the arbiters was expressly required by the submission. The statute is further interesting, as it affords strong presumptive evidence that arbitration had largely prevailed at that early period; and, moreover, it was, in one sense, the precursor of the Act of Regulations 1695, inasmuch as it showed that it was held to be matter of national concern to place the system of arbitration on what was then considered to be a sound practical basis. It runs in these terms: "Ordinatum est super omnibus et singulis causis, infra regnum, nunc pendentibus sub compromisso, si inter Clericos, arbitri sint electi in pari numero,—per diocesanum Episcopum, de concilio sui capituli, dispar persona, partibus non suspecta, eligatur. Si vero inter Barones, vel quoscunque alios laicos, extra Burgum commorantes,—tunc eligatur dispar persona, neutri partium suspecta, per Vicecomitem, infra cujus balliam, partes compromittentes commorantur, de concilio tamen Baronum, quos Vicecomes ille, commode pro tempore habere poterit, neutri partium suspectorum. Si autem inter Burgenses, seu alios habitantes infra Burgos, arbitri sint electi,—tunc dispar persona non suspecta, per Præpositum et Concilium Burgi, infra quem partes inhabitant, eligatur. Ad negotia vero, causas et lites futuras per arbitria terminandas, arbitri, de cetero, in dispari numero et non in pari, eligantur. Arbitria, autem, aliter inita et facta, nullius sint roboris vel momenti."

786. In the modern state of the law, unless express power is given to a majority to decide, "all the arbiters ought to agree in opinion, in the same manner that, in a mandate granted to several mandataries, all of them must concur; because the mandant is presumed to rely on the fitness, not of any one, nor even of any number of them, but of them all taken jointly."[1]

787. Where a submission is made to three arbiters, "and, in case of their difference, to any two of them," it is not requisite that the fact of one of the arbiters having dissented from the other two, should be proved in writing under his own hand. It is enough if the two arbiters who form the majority duly narrate the difference of opinion in their award, and no proof is offered to impugn the truth of the statement.[2]

788. Where a submission was made to five arbiters, and the parties bound themselves to implement "whatever the said arbiters, or, in case of variance in opinion, the majority of them, shall determine," two of the arbiters, after the proof was concluded, intimated that they had renounced their office, on account of alleged partiality and irregularity by the majority; and they protested against further procedure in the

[1] 4 Ersk. 3. 34; 1 Bankt. 23. 10; More, Feb. 10, 1693 (14720).
[2] M'Callum, May 23, 1826, 2 W. & S. 344.

submission. They also specially protested against the validity of a prorogation which had been made by the other three arbiters composing the majority. The latter denied the charges of partiality and irregularity, and afterwards pronounced an award, which was brought under reduction. The pursuer of the reduction pleaded, *inter alia*, that, although a majority was empowered to pronounce an award, it was essentially implied that this must be the majority of a complete and continuing board of five arbiters, who had all acted throughout until the period of pronouncing the award. The Court considered the question to be attended with great difficulty; and the case having, in its progress, been under the consideration of seven Judges, four of their Lordships held the award good, while three Judges were of an opposite opinion. The award was sustained.[1]

789. The opinions of the Judges in the Inner House are not reported. The interlocutor of L. Eldin, Ordinary, reduced the award, "in respect that, although the majority of the arbiters had power to determine in the premises, in case of variance of opinion, the majority had no power to determine, when there was no variance of opinion; or when the remaining arbiters were not made acquainted with the proceedings, or were not consulted by the majority; or declined to take any further concern in the submission; and that legal remedies might have been applied in such a case, if the majority had refused to determine, in the absence and without the knowledge of the remaining arbiters." This interlocutor was altered on review, and the award was sustained.

790. The history of this case suggests the great inexpediency of making a submission to five arbiters at a time. Perhaps it may be allowed also to remark—considering the divided state of judicial opinion regarding it—that the case appears to involve doctrine which would go far to support an award by a majority (wherever the submission authorised a majority to decide), even although two arbiters out of five, or one out of three, should die or renounce office at one of the earliest stages of a submission. But it seems unadvisable to enter further on the subject, until it shall be more elucidated by decisions.[2]

[1] Love, June 1, 1825, 4 S. 54.

[2] It may be remarked, that although, according to the Regiam Majestatem, as already noticed, a majority of arbiters had power to decide, it was there also provided (L. 2, cap. 9, sec. 2); "Item, si duo vel tres arbitri electi fuerint per partes; nullus, sine sociis, potest procedere."

CHAPTER XIII.

STATUTORY ARBITRATION.

791. EVER since land has been compulsorily taken from individuals by statutory authority, for public purposes, resort has frequently been had, both in England and Scotland, to arbitration, as the most convenient mode of disposing of the numerous claims of compensation which thus arose. In particular, since the recent general introduction of railways, the tribunal of the arbiter has been an almost indispensable auxiliary, to supplement the more rigid procedure of Courts of justice in dealing with such questions. It appeared, accordingly, to the Legislature at a time when numerous Railway Acts were passing, that it was desirable to facilitate this method of adjusting such claims; to make arbitration, in many cases, compulsory, at least as regarded the promoters of the Railway or other public Undertaking; and to lay down some general rules for governing all statutory arbitrations, with the view of protecting the interests of both parties, and especially of that party whose private property was taken from him, or was alleged to be injured, by the promoters of the public Undertaking.

792. This object was carried out by passing several statutes, English and Scotch respectively, which, generally speaking, apply similar arbitration procedure to both kingdoms. The statutory code of rules affecting Scotland will be found chiefly in the Lands Clauses (Scotland) Act, 1845, 8 and 9 Vict. c. 19,[1] secs. 20, 21, and 23 to 35; the Companies Clauses (Scotland) Act, 1845, 8 and 9 Vict. c. 17, secs. 131 to 136; and the Railways Clauses (Scotland) Act, 1845, 8 and 9 Vict. c. 33, secs. 119 to 129.[2]

793. It was foreseen, when this subject was under the consideration of the Legislature, that the limited powers of heirs of entail, liferenters, curators, judicial factors, and others, having only a qualified or partial estate in the lands required by the public Undertaking, would present an insuperable obstacle to the progress of the Undertaking, unless a statutory remedy was applied. Accordingly, the

[1] An amending Act, 23 and 24 Vict. c. 106, extends the application of some of the provisions of this Act, but does not alter its arbitration clauses.

[2] [See also Masters and Workmen Arbitration Acts (1824 and 1872), 5 Geo. IV. c. 96, and 35 & 36 Vict. c. 46; Railway Companies Arbitration Act (1859), 22 & 23 Vict. c. 59; Companies Act (1862), 25 & 26 Vict. c. 89, secs. 72, 73, 162; Regulation of Railways Act (1868), 31 & 32 Vict. c. 119, secs. 30-32; Board of Trade Arbitrations Act (1874), 37 & 38 Vict. c. 40; Building Societies Act (1874), 37 & 38 Vict. c. 42, secs. 34, 36; Friendly Societies Act (1875), 38 & 39 Vict. c. 60, sec. 22; Industrial and Provident Societies Act (1876), 39 & 40 Vict. c. 45, sec. 14, §§ 1, 2; Savings Bank (Barrister) Act (1876), 39 & 40 Vict. c. 52, sec. 2, § 1.]

Lands Clauses Act contains provisions (secs. 7-14) empowering heirs of entail, and others of the class above mentioned, who are possessed of lands, or any estate or interest therein, to sell and convey the same to the public Undertaking; and, *inter alia*, to enter into arbitrations for the purpose of having the just price of the lands thereby ascertained, as well as the just amount of compensation to be paid for damages done by the execution of the works of the public Undertaking, to lands not purchased by them.

794. In putting this system into operation, the code of arbitration-rules contained in each of the three statutes above quoted is, to a great extent, the same. The chief clauses themselves will be found in the Appendix, as they do not easily admit of safe abridgment. But a few of the general rules which they embody may here be noticed; and it will be found that, whilst some of them appear to be open to objection, in regard to their practical working, there are others which provide valuable remedies against certain risks of miscarriage which attach to the ordinary submission at common law.

795. Taking the arbitration-scheme of the Lands Clauses (Scotland) Act for an example, it is there, in the first place, declared, that wherever a question of disputed compensation exceeds £50, it shall be competent to the party claiming compensation to give certain written notice to the other party, within the time therein limited; after which the question "shall be settled by arbitration, in the manner hereinafter provided;" unless the other party, within twenty-one days after receiving the above notice, shall agree in writing to pay the compensation claimed (sec. 23).

796. Provision is made for the appointment, in writing, of one or more arbiters, under the hand of the respective parties;[1] and it is declared that, after such appointment shall have been made, "neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation." In the event of one of the parties failing to appoint an arbiter for fourteen days after a written request, served on him in the terms set forth in the statute, the "party making the request, and having himself appointed an arbiter, may appoint such arbiter to act for both parties;" after which, such single arbiter may proceed to hear and determine the matters in dispute, his award being declared final (sec. 24). It has been decided in England, with respect to the corresponding clause in the English Lands Clauses Act (8 and 9 Vict. c. 18, sec. 25), that the party who has requested the other to name an arbitrator, and means to found upon the other's failure to do so, should not merely have intimated his intention to name a certain arbiter on his own part, but should have actually *appointed* him; otherwise he

[1] See sec. 24 for the description of the proper parties to sign the appointment, in the several cases there specified.

will not have the right, under the statute, to appoint one arbiter to act for both parties.[1]

797. In the event of one of the arbiters dying, or becoming incapable to act, pending the reference, and of the failure by the party who named him, to appoint a new arbiter within seven days after receiving statutory notice to do so, the other arbiter may proceed *ex parte*, with all the powers which were vested in the original arbiter at the time of his death or disability (sec. 25).

798. Where more arbiters than one are appointed, they are required to make a written appointment of an oversman (umpire), "before they enter upon the matters referred to them." In the event of the oversman's death or supervening incapacity, the arbiters are required forthwith to appoint another oversman in his place; and if they either refuse, or, for seven days after the request of either party, neglect to appoint a new oversman, either party may apply to the Lord Ordinary on the Bills to appoint an oversman.[2] The oversman, whether appointed by the arbiters or by the Lord Ordinary, is declared to have the power of finally deciding all "matters on which the arbiters shall differ, or which shall be referred to him under this or the special Act" (secs. 26, 27).

799. If a sole arbiter dies, or becomes incapable to act, the matters referred to him are to be determined by arbitration under "this or the special Act, in the same manner as if such arbiter had not been appointed" (sec. 28).

800. If either of the arbiters (when there are more than one) refuse, or for seven days neglect to act, the other arbiter may proceed *ex parte;* and "the decision of such single arbiter shall be as effectual as if he had been the single arbiter appointed by both parties" (sec. 29).

801. Where there are more arbiters than one, unless they shall make an award within twenty-one days after the date when the last of them was appointed, "or within such extended time as shall have been appointed for that purpose by both such arbiters under this Act," "the matters referred to them shall be determined by the umpire (oversman)," (sec. 30).

802. Powers are given to the arbiters or oversman to call for production of any documents in the possession, or within the power, of

[1] Russ. 98, [4th ed., 93]; Bradley, Nov. 4, 1850, 5 Wel. Hurl. and Gord. 769.

[2] Where two arbiters could not agree on an oversman, one of the parties applied to the Lord Ordinary on the Bills to name an oversman under sec. 27. His Lordship named an oversman, and his interlocutor was held not liable to review. Question, whether every interlocutor of the Lord Ordinary disposing of such an application be exempt from review? After the Lord Ordinary had appointed the oversman, who accepted, and who was under no disqualification, held that he had no power to recall the appointment, although he would not have made it had all the circumstances been timefully stated to him. Mackenzie, Dec. 21, 1861, 24 D. 251.

the parties; to administer oaths to the parties and witnesses, and examine them; and to "take all evidence competent according to the law of Scotland" (sec. 31). Unless these last words are read as importing power to take all evidence which it is *competent for an arbiter to take*, according to the law of Scotland, they might be founded on as restricting the arbiter to lead only such evidence as is competent in a court of law, according to the law of Scotland; which would greatly limit the arbiter's power in leading proof, below what is competent in an ordinary submission, and would seem, moreover, to lay his award open to review, in the event of his admitting incompetent evidence. It is difficult, however, to suppose that this could have been intended, as it would have the effect of depriving statutory arbitration of the essential attribute of finality.

803. It is provided, with respect to the expenses of, and incident to, an arbitration, that where the claimant of compensation receives a larger sum than was offered to him by the promoters of the Undertaking, he is to be allowed all his expenses; but otherwise, each party shall pay his own expenses; and, in all cases, the expenses of the arbiters, or oversman, as the case may be, and of recording the decreet-arbitral or award in the Books of Council and Session, shall be borne by the promoters of the Undertaking" (sec. 32).[1]

804. It would appear from this last clause, that the statute contemplates that payment of suitable remuneration to the arbiters and oversman is to be made in all cases, and that this expense is laid upon the promoters of the undertaking. Such a provision, besides being only just towards the arbiters, was apparently considered requisite, in order to command the prompt services of a class of arbiters, of such number and sufficiency as would insure the practical working of the system of arbitration, to any extent which might be found necessary. It has been held in England, with regard to this subject, under the analogous provision in the Lands Clauses Act, that an arbitrator, or umpire, is not bound to give up his award until his reasonable charges are paid; and that he has a lien over the award.[2] How far his fees are liable to taxation, is discussed in the passage quoted below.[3]

805. Provision is also made on the subject of executing all awards in writing, and recording them in the Books of Council and Session, and the issuing of extracts of the awards" (secs. 32, 33).

806. It is declared that no award "shall be set aside for irregularity, or error in matter of form" (sec. 34). The terms of this clause

[1] [See also Burnet v. Henry, Nov. 30, 1866, 5 Macph. 96, where the expenses incurred by the clerk were held to be payable by the promoters.]

[2] S. Devon Ry. Co., Nov. 13, 1850, 15 Ad. and El. (Q. B.) 1043.—See 8 and 9 Vict. c. 18, secs. 34, 35.

[3] Russ. 453, 454, [4th ed., 459, 460].

are a transcript from sec. 37 of the English Lands Clauses Act, 8 and 9 Vict. c. 18. They do not appear to be well chosen, as regards the law of Scotland. The precise measure of protection which they afford to awards is not well defined. But it would rather appear that they leave an award, which has been pronounced under the statutory procedure, exposed to challenge on various grounds which cannot be competently pleaded against an award which has been pronounced under an ordinary submission; unless it shall be held that, besides the statutory protection above mentioned, the submission being a Scotch submission, is entitled to the protection which the Act of Regulations 1695 extends generally to every "subscribed submission" executed in Scotland.[1]

807. An important provision is added (sec. 35), that, "if the arbiters, or their umpire (oversman), shall, for three months, have failed to make their or his award, the question of such compensation shall be settled by the verdict of a jury."[2] But the submission may be prorogated by the consent of parties.—See *infra*, sec. 827.

808. In the other two Acts above mentioned—the Companies Clauses (Scotland) Act, 1845, and the Railways Clauses (Scotland) Act, 1845—the plan of the arbitration procedure, and the respective provisions, are so similar to those of the Lands Clauses (Scotland) Act, that it seems enough to refer to the clauses themselves in the Appendix. In both Acts, however, a larger discretionary power over all the costs is given to the arbiters or umpire than in the Lands Clauses Act.

809. The perusal of these clauses[3] is calculated to suggest various topics of reflection in regard to arbitration-law, some of these provisions being open to objection, while others, on the contrary, are so salutary, that it would be an improvement to ingraft them, by statute, upon submissions at common law, in all cases in which the parties did not expressly exclude them. It is true that no interference whatever

[1] It may be noticed that, under the English Act, it has been held that "the Court will not entertain an objection that the award is contrary to evidence."—Bradshaw, 1848, 12 Ad. and El. (Q. B.) 562.

[2] The corresponding clause in the English Act (8 and 9 Vict. c. 18, sec. 23) is expressed (*quoad hoc*) in nearly the same terms. It has been held in England, that, first the arbiters, and next the umpire, may have a period of three months each for making an award.—Skerratt, Jan. 20, 1848, 2 Phil. Ch. 475; Bradshaw, 1848, 12 Ad. and El. (Q. B.) 562.

[3] See also secs. 63, 64, 65, 66, of the Lands Clauses Act, regarding such arbitrations as may be entered into regarding questions of compensation, in which sums have been deposited in bank, according to a valuator's estimate, in the absence of the owner, or other party interested. See also secs. 118, 123. Among the clauses for enabling incapacitated persons (secs. 7-14), it may be noticed that sec. 9 contains a mode of adjusting certain compensation-money, etc., by modified arbitration,—viz., by two valuators, mutually chosen, and in the event of their disagreement, by a valuator appointed by the Sheriff on the application of either party.

should be allowed to take place with the large freedom which an arbiter at present most beneficially enjoys in the conduct of a submission at his own discretion; for this is of the very essence of the best arbitration-procedure. But, wholly apart from this, there are risks of fatal miscarriage to which submissions are now liable, and against some of which the parties cannot protect themselves without the aid of legislative enactment. To that limited extent, such legislation would be safe and useful.

810. At present, it stands fixed by a series of decisions, that parties cannot effectually bind themselves to submit either their present or future disputes to arbitration, unless they also, at the same time, name the individual arbiters to whom the disputes, whether presently existing, or when they may afterwards emerge, shall be submitted. This is the general rule, which is subject to a peculiar qualification in a class of cases already noticed.[1] It has been said on the Bench, that there is no sound reason for such a rule,[2] and the very existence of the exceptional class of cases shows that there is no practical difficulty in dispensing with it. In the meantime, its operation produces great injustice, as it enables a party, upon a technical legal rule, to violate the *bona fide* import of his own contract, and to evade his onerous and important obligation to enter into a submission, just when the very case has arisen for which that contract was meant to provide. Nor is it possible for the parties, by any agreement of theirs, to protect themselves against this eventual risk, so long as they do not name arbiters at the outset of their contract. But it may obviously be highly imprudent, at entering into a contract of partnership (for instance), which is to endure for a term of years, to name a specific individual in the contract, who shall be intrusted with the high powers of an arbiter in dealing with disputes which may emerge only after many years have elapsed. In the interval, events may have occurred which would render it very unsuitable that that individual should be the arbiter; and which yet may not constitute any sufficient legal ground of objection against him, if he has once been named in the contract. It may therefore be justly regarded by many men as an indiscreet act, to name an individual arbiter in such circumstances as those now referred to. But unless this is done, the parties cannot, in the existing state of the law, secure for themselves, when entering into partnership, the important protection of a valid mutual obligation, which shall constrain them, when the event arrives, to submit any emerging disputes to arbitration.

811. The existence of this defect in the law is in so far a reproach to it, that it deprives the lieges of important assistance and protection

[1] *Supra*, sec. 139 *et seq.*

[2] Per L. Mackenzie, in Smith, Feb. 28, 1843, 5 D. 749. See also observation of L. Cockburn, at the close of his Note, in Smith, *ibid.*

to their interests, which the law, by a slight practical amendment, might easily be made to afford. The alleged reason why an obligation to submit disputes is left inoperative, if it names no individual arbiters, has been said to be, that it is impossible to compel a party, who has undertaken such an obligation, to discover, at any given time, an individual in whom he can repose that high confidence and trust which belong to an arbiter's office. It may well be doubted whether this is not, generally, a chimerical difficulty, resorted to for the purpose of evading an onerous obligation. But wherever the difficulty, either truly or falsely, is alleged to exist, the remedy should be applied which is employed in the Lands Clauses Act, sec. 27, when arbiters fail to name an oversman. Either party may then apply to the Court to name an oversman. In like manner, if, after two parties have deliberately bound themselves to submit their disputes to arbitration, one of these same parties, on the emergence of disputes, alleges that he cannot find an arbiter to his mind, it should be made competent to the other party to apply to the Court of Session, or to the Sheriff, as Judge-Ordinary of the bounds, to name an arbiter, instead of the defaulting party. This would insure the careful appointment of an impartial person; and the defaulting party could have no reason to complain. In fact, the existence of such a remedy as this would probably make the instances very few, in which each of the parties would not promptly name an arbiter for himself.[1]

812. This same practical remedy, besides being employed, as just noticed, in the Lands Clauses Act, is also resorted to in England, in the Common Law Procedure Act, 17 and 18 Vict. c. 125, sec. 12. It has existed in France at least since the time of Louis XIV.[2] Had it been likewise in existence in Scotland, there are numerous cases of flagrant injustice which it would have prevented; and there must be cases without number, in which parties would have been thereby enabled, at entering into partnerships or other contracts for a term of years, to provide for the protection of most important interests, in a manner much more safe and satisfactory for themselves, than the existing state of the law makes it possible for them, even by the exercise of the highest prudence, to accomplish.

[1] See also sec. 9 of the same Act, which provides, that where two valuators disagree, either of the parties may apply to the Sheriff to name a valuator, on whom it then devolves to fix the valuation.

[2] "Ces arbitres doivent être convenus et nommés par les parties: faute par quelqu'une d'elles d'en nommer, le Juge en nomme un pour elle."—Ordonnance de 1673, tit. 4, art. 9.

"Si, avant que les arbitres aient rendu leur réglement, l'un desdits arbitres vient à mourir, l'Ordonnance veut que la partie qui l'a nommé, en nomme un autre à sa place; ou le Juge, à son refus."—*Ibid.*, art. 10.

Pothier, Traité du Contrat de Société, Chap. VII. Art. iv. De l'action pro socio, sec. 136 (4to ed., 1781, tom. ii. 582).

813. There are other provisions of the statutory code, however, which are less eligible than that which sanctions the judicial nomination of an oversman to be made, in default of the arbiter's doing so. It is declared (sec. 29), that if one of two arbiters either refuses, or for seven days neglects, to act, the other shall act with all the powers of a sole arbiter. It seems difficult to reconcile this rule with justice or sound policy. It may happen, from various causes, without any fault of the party himself, that the arbiter named by him shall refuse, or shall for a few days neglect, to act, pending the reference. It seems a harsh and injurious result for the party who named him, that, *de plano*, his interests are, in that event, to be placed in the hands of the arbiter named by his opponent, who may often, as already noticed, be influenced by a decided bias, which will be highly injurious, even although the arbiter be honestly unconscious of its existence. There does not appear to be any adequate ground for subjecting an innocent party to such a hardship. The easy remedy of allowing an application to the Judge to name an arbiter in place of the defaulter, would seem to be preferable to the present statutory rule.

814. Perhaps also the provision is of too rigorous a character, which declares (sec. 25), that when a party fails for seven days, after notice, to name a new arbiter in place of an arbiter deceased, etc., the surviving arbiter shall be empowered to act as sole arbiter. The object of the statutory arbitration is, of course, to do justice between the parties; certainly not to visit even a party's default, vindictively. But that object would be much more nearly attained by authorising the opposite party, in this contingency, to apply to the Court (at the expense of the defaulting party) to name an arbiter in lieu of the arbiter deceased, etc. This would forthwith put the arbitration in good working order for all concerned, which is the true end to be aimed at, and seems preferable to the sweeping enactment which so summarily places the whole interests under submission in the power of a single arbiter, who is the nominee of one of the parties, and who may so often be influenced, whether consciously or not, by a decided bias, that the commission of marked injustice becomes the probable result of such a proceeding. Even if it were matter of moral certainty, that every person must, by reasonable exertion, be able, at all times, within the limited space of seven days, not only to find a man in whom he can fully confide, but also a man who is willing to act as arbiter, the provision in question seems of too harsh a character; but as there is no such moral certainty, by any means, the provision has a savour of injustice, which should have made the Legislature pause before enacting it into a law.

815. It is an important statutory provision, that the arbitration shall not fall by the death of either party (sec. 24). Many ordinary submissions have fallen from that cause, so as to produce great loss of

time and expense, and to leave a lawsuit still behind. But as this is a matter which the parties to every submission have full power to arrange at their own discretion, it would not seem advisable to make any enactment altering the common law on the subject. The statutory provision (sec. 26), that arbiters shall always name an oversman before they enter on the matters referred to them, is very salutary in itself, and should be introduced by all parties into their contracts of submission, unless special circumstances induce them, in particular instances, to refrain from doing so. But as it is a provision which the parties may impose on their arbiters whenever they think it expedient to do so, there would not seem to be any ground for legislative interference with the common law on this subject.

816. It is obviously proper in every case to ascertain whether a party will accept the office of oversman before the arbiters exercise their power of nominating him. This is especially necessary where the statute enjoins the nomination to take place "before they enter upon the matters referred to them." Accordingly, inattention to this precaution has proved fatal to a statutory arbitration. It turned out that, when an oversman, who had been duly appointed at the outset, was afterwards called on to act, in consequence of the arbiters differing in opinion, he refused to accept the office. The statutory period of three months thus elapsed without an award. One party then insisted on commencing the arbitration anew, naming an arbiter on his part, and calling on the opposite party to do the same. But the latter objected, that as there had been an arbitration, and a failure to pronounce an award within the fixed statutory period, the disposal of the question of compensation now fell under sec. 35 of the Lands Clauses Act, and it must go before a jury. The Court sustained this plea.[1]

817. The provisions which contemplate rapidity of procedure, and also the peculiar terms of the statutory protection of the award, have been already noticed. With regard to the arbiter's statutory powers of hearing, leading proof, disposing of expenses, etc., his mode of exercising these powers seems to stand in all respects as well, and in some respects on a better footing, under the submission at common law. On considering the statutory code, as a whole, particularly the limitation which it imposes on the duration of a submission, unless both parties shall agree to prorogate it; the inability of a purely statutory submission to embrace all the interests which the parties may require to have adjusted;[2] and the risk of nullity of the whole procedure which may result from the neglect of details which have been subjected to statutory regulation;[3] it is not difficult to understand why

[1] Anderson, June 3, 1853, 15 D. 713.

[2] See observations of L. Pres. M'Neill, in Caled. Ry. Co., *infra*, sec. 824.

[3] See Glasgow, B., and N. Ry. Co., *infra*, sec. 819.

it has so often happened that parties, on entering into submissions with Railway Companies and others, have avoided the adoption of the pure statutory forms, and have resorted to a common law submission, upon which a certain selected portion only of the statutory provisions was ingrafted.

818. Where the statutory period of three months had expired, after the commencement of the submission, without any award, it was held that the submission had fallen, although one of the parties (a Railway Company) contended that a portion of the time had been rendered unavailable, because of an interdict at the instance of the other party; the interdict having been founded on certain faulty procedure on the part of the Company, which they required ultimately to abandon.[1]

819. In a strictly statutory submission, there are some imperative rules imposed by statute, which cannot be violated without invalidating the award. The statute gives no power to the parties, but only to the arbiters, to appoint the oversman; and it requires the arbiters to make the appointment before they enter on the matters submitted. In a statutory submission, after the arbiters had duly appointed the oversman, the submission was allowed to fall. Afterwards, the parties renewed the submission. Considerable procedure took place before the arbiters, who eventually disagreed, and executed a minute devolving the submission "upon William M'Creath, the oversman already appointed by us." An award, thereafter pronounced by the oversman, was held invalid by the House of Lords (reversing), in respect that "the *parties*, who cannot name the oversman, never can be held to name him by naming the arbitrators;" which was all that had been done when the submission was renewed: and further, in respect that the arbitrators were bound to have appointed the oversman "before they break ground; before they proceed to business."[2] On these grounds, it was held that an appointment of an oversman, which was made under circumstances which would have seemed sufficient to support it in the case of an ordinary submission, was radically invalid in a statutory submission, and his award accordingly fell.

820. It has been observed, with respect to the preceding decision, that "the particular grounds of reversal (which had not been hinted at in the proceedings in the Court of Session) were placed, entirely and exclusively, on the departure, in that case, from those rules which, in all submissions purely statutory, the Legislature had made imperative." And the same doctrine was held inapplicable, where the submission was not "one purely and absolutely under the statute, and, conse-

[1] Laing, Nov. 14, 1846, 9 D. 70; and Jan. 19, 1850, 12 D. 481.

[2] Per L. Brougham, in Glasgow, B., and N. Ry. Co., Aug. 5, 1830, 7 Bell's App. 325.

quently, dependent for its effect on the strict observance of the statutory rule." [1]

821. There is no incompatibility in the structure of a submission which is in part of a statutory character, and in part possessed of the attributes of a submission at common law. A submission of a question of disputed compensation was made between a Railway Company and a land-proprietor, in which they expressly agreed that the arbiters should possess the power of prorogating at pleasure, and also that the submission should be held to have been entered into under the Lands Clauses and the Railways Clauses Acts. After various procedure, and a lapse of two years, an award was pronounced, which was homologated by decided acts of acquiescence on the part of the Railway Company. Thereafter, the Company having presented a suspension of a charge upon the award, it was held that this was barred by their acts of homologation and acquiescence. Opinions were, at the same time, expressed to the effect, that, even in the case of a submission exclusively under the statutes, an award which had been irregularly pronounced might be effectually homologated; and further, that in the present case, as the submission gave express power to the arbiters to prorogate at pleasure, it could not be the intention of the parties to declare, at the same time, that the submission was to be taken literally as a statutory arbitration, restricting the period of endurance to the narrow statutory limits, as that would imply a plain contradiction in terms; and that the submission, according to its true construction, adopted the provisions of the statutory arbitration only in so far as not inconsistent with the special provisions expressed by the parties in their contract.[2]

822. The case last mentioned involved a plea of homologation of the award, after it had been pronounced. But, in a subsequent case, which was free of this specialty, it was held by the Court of Session, and affirmed in the House of Lords, that the parties may, if they think fit, by voluntary agreement, enter into a submission which shall embody the provisions of a proper statutory submission, in so far as the parties choose to adopt them, and, *quoad ultra*, shall have the ordinary legal attributes of a common submission. In any such instance, however, great care should be taken explicitly to state the intention of the parties, so that it may clearly appear to what precise extent they adopt the provisions of the statutory and the common-law submissions, respectively. In the case just mentioned, the facts raised a question, whether it was the intention of the parties to adopt the statutory rule, according to which a submission endures notwith-

[1] Per L. Fullerton, in Dundee, P., and A. Ry. Co., Jan. 31, 1851, 13 D. 552. See also Caled. Ry. Co., Feb. 25, 1857, 19 D. 527; and 3 Macq. 808.

[2] Dundee, P., and A. Ry. Co., Jan. 31, 1851, 13 D. 552. The details of the case involve specialty. But the above views were expressed by the Judges in disposing of it.

standing the death of a party; or the common-law rule, by which the death of a party causes the fall of any submission, in which no express provision has been made to the contrary.[1] The Judges in the Court of Session differed in opinion on this question; and as its determination affected the validity of the award, the necessity of precision in framing so peculiar a submission was made very evident.

823. The details of this case are instructive in this branch of arbitration procedure. It was a question of disputed compensation for land, etc., between a Railway Company and the proprietor of the lands. The submission contained a clause, "declaring that the said arbiter shall conduct the proceedings to follow hereon, and determine the matters hereby submitted to him, in strict conformity with the rules and regulations, under the provisions and conditions specified in the foresaid Act (Lands Clauses Act, 1845), and of the Acts 8 & 9 Vict., c. 17, and c. 33 (Companies Clauses and Railways Clauses Acts)." The submission bound the parties to implement both interim and final awards. It embraced not merely claims of compensation for land, but claims for "accesses," etc. After repeated prorogations, which were executed by the agents of the parties during the first eight months of the submission, the parties themselves executed a minute, dated 6th and 9th November 1846, by which they "of new submit to the arbiter the whole matters embraced under the within submission." By this minute they homologated the former prorogations, and themselves prorogated the time for determining the matters submitted, "to the day of next;" they also empowered the arbiter to make future prorogations "at pleasure." The arbiter executed repeated prorogations, and eventually pronounced an interim award, followed by a final award. Before the final award was pronounced, the private party died; immediately on which event, the Company insisted (first in a suspension, and afterwards in a reduction) that the submission had fallen, contending that, if it was a statutory submission, it must have fallen by the lapse of more than three months, the period to which it was limited by statute; and if a submission at common law, then it fell by the death of the party. They also insisted in other objections, noticed in the opinions of the Judges. The heir of the party, who had been sisted in the submission on his predecessor's death, maintained that the submission was not exclusively statutory, but was an ordinary submission, into which the statutory provisions were introduced, so far as not expressly excluded; and, consequently, the statutory rule which kept the submission alive, notwithstanding a party's death, qualified the submission, and saved it from falling. A majority of the Judges in the Court of Session sustained the award, and their judgment was affirmed. In the opinions of the Court, several interesting points were considered.

[1] Caledonian Railway Co., Feb. 25, 1857, 19 D. 527.

824. In the reduction of the award, the Railway Company contended, *inter alia*, that the submission could not be statutory, because it embraced matters not within a statutory submission, such as a claim for accesses; it gave power to pronounce interim-awards, which (they alleged) was not a power within the statute; and it consented to registration of the award for summary diligence, which also was not within the statute. L. President M'Neill observed: "I think that this submission does go beyond the matters which arbiters are empowered to decide under the provisions of the Lands Clauses Act. It goes beyond the matter of fixing the price, and the compensation to be made generally for the taking of land. It embraces, in particular, the matter of accesses." "The submission also contains a clause of registration, and a clause consenting to letters of horning on six days' charge—consequences which the statute does not attach to a decree-arbitral." His Lordship then added that he thought "this was not a strictly statutory submission," nor understood to be so by the parties. "There is a clause in it, that the arbiter shall proceed in conformity with the rules and conditions of the statute. I know nothing in the common law of Scotland, in regard to submissions, which would prevent the parties from introducing a condition of that kind into a submission, although they did not hold it to be a strictly statutory submission. They might choose to limit the period for issuing the award to three months. They might choose to provide, in that way, that the submission should not fall by the death of one of the parties." "I think the parties imported into the submission all these conditions of the Lands Clauses Act, but that they had power to relax these by mutual consent. They did relax the condition as to the necessity of deciding within three months, but they did not depart from the provision which preserves the submission alive, notwithstanding the death of one of the parties." His Lordship also observed that he gave no opinion on the competency of parties prorogating a strictly statutory submission, or reviving it after the three months had elapsed. After repelling, *inter alia*, a plea of *ultra vires*, which was rested on the allegation that the arbiter had unduly awarded certain contingent and prospective damages, his Lordship stated, in conclusion, that he was "of opinion that the submission was truly not a statutory submission. I think that the parties were entitled to attach to it the conditions which the statute provides for the mode of conducting such submissions, and entitled to depart from these conditions by mutual agreement, if they chose; that they did attach these conditions, and did depart from some of them, but not from others; and therefore that the decree-arbitral is not reducible on any ground here stated." His Lordship held the case of the Glasgow, B., and N. Railway Co. (*supra*, sec. 819) to be inapplicable.

825. L. Ivory and L. Curriehill agreed with the Lord President;

L. Ivory observing, on the question as to the effect of the death of the party, that he held the statutory rule to have been imported into the submission by the agreement of parties; but that, independently of this, as the facts of the case involved a sale of land, coupled with the ceding of possession of the land, and its being irrevocably altered in its condition, the submission to fix a price was truly ancillary to this contract of sale, and even at common law would not have fallen by the death of a party. His Lordship also observed, that, as the case was presented to the Court, it did not appear necessary to decide whether the submission would have been valid, if the landowner had been shown to be an heir of entail; but that, even if the fact were so, he inclined to think (though not prepared to express any absolute opinion) that the submission might have been sustained, as being "one of those agreements which the seventh section (of the Lands Clauses Act) authorises."

826. L. Deas dissented; observing, *inter alia*, that if it were to be held that the parties, by giving the submission an endurance beyond the statutory period, had converted it into a common-law submission, then it seemed to follow that the whole question of endurance of the submission was to be dealt with at common law, and consequently that the submission fell on the party's death.[1]

827. In the House of Lords opinions were expressed, *inter alia* respecting the power of parties to prorogate a strictly statutory submission; the effect of the death of a party-submitter in the circumstances of the present case; the alleged excess of power, by the award of prospective or contingent damages; and the power of an arbiter to remit to a man of skill. In moving the judgment of affirmance, L. Campbell, C., observed, with respect to the question whether the submission was properly statutory or not: "I am clearly of opinion, that whatever view is taken of the nature of the submission, the authority of the arbiter continued in full vigour down to the time when he executed the final decreet-arbitral. The 35th section of 8 & 9 Vict. c. 19, says that, 'if, when the matter shall have been referred to arbitration, the arbiters, or their umpire, shall, for three months, have failed to make their or his award, the question of compensation shall be settled by the verdict of a jury.' But this is merely a power given for the advantage of the parties, enabling either party to obtain a settlement of the compensation by a jury, in case of improper delay in the arbitration; and this disadvantage parties might renounce. It could not possibly have been the intention of the Legislature to prohibit the parties from enlarging the time for making the award for a week, if, at the expiration of three months from the date of the submission, the arbiters, after great labour bestowed and heavy expense incurred,

[1] Affd. Mar. 23, 1860, 3 Macq. 808. See this case also noticed, *supra*, p. 123, note 3.

required a few days more to complete their inquiries and perfect their calculations. It seems to me absurd to suppose (as was suggested), that this enlargement could only take place once for three months. Neither the statute, nor common law, nor common sense, imposes such a limit on the power."[1] "The enlargement of the 6th and 9th November 1846 amounted to a fresh submission, giving the arbiter in the most express language, 'at his pleasure, power further to enlarge the time, both parties binding and obliging themselves to acquiesce in and fulfil his award, and homologating and confirming the bygone prorogations.'"

828. With respect to the plea founded on the death of one of the parties, L. Campbell observed that, "if this was merely a conventional, or common-law submission, the intention of the parties was to include in it the provision of the statute, that it should not determine by the death of the landowner who was claiming the value of his land taken by the Company, and compensation for the damage done to the rest of his estate, by the severance and the works which the Company had constructed, and were about to construct, under the powers of their special Act. The arbiter was in the situation of a person appointed by vendor and purchaser, to fix the value and price of an estate sold. And the case of Lord Selkirk *v.* Nasmyth[2] clearly shows that when there is any such reference, it is, by the law of Scotland, to proceed notwithstanding the death of one of the parties."

829. Regarding the plea founded on alleged excess of power by the arbiter, L. Campbell observed: "The chief objection was made to the award of compensation for damage likely to be sustained, in future, from the water of the Clyde being penned back by the works of the Company, and thereby damaging the land of the claimant. It was contended that such prospective damage could not properly be included in the award; and that if any such damage should arise, the proper remedy would be an action against the Company. But I am of opinion that the arbiter was bound to take into his consideration the damage to the land of the claimant, likely to be produced by the works which the Company were authorised to construct, and were constructing, by virtue of an Act of Parliament; and that no future action could be brought against the Company, except for negligence in the original construction of these works, or in the manner in which these works were kept in repair."[3] "It would, indeed, have been strange, if, although the mound which the appellants were constructing across the valley of the Clyde, under the powers of the Act of Parliament, would certainly force back the water, to the injury of the

[1] Caled. Ry. Co., Mar. 23, 1860, 3 Macq. 810. [See also Mackenzie *v.* Inverness and Aberdeen Rail. Co., June 9, 1866, 4 Macph. 810, where it was doubted by Lords Deas and Ardmillan, whether the parties could competently prorogate or renew a statutory submission when one of them was an heir of entail.]

[2] Jan. 17, 1778 (627), Hailes' Dec. 780.

[3] Caled. Ry. Co., 3 Macq. 813.

claimant's land, every time the Clyde was in flood, and there was a moral certainty that the Clyde would periodically be in flood, the damage likely to be done could not be calculated and included in the compensation once for all to be awarded; and if the remedy intended for him was a fresh arbitration, *toties quoties*, when the flood came down."[1]

830. L. Campbell likewise repelled the objection "made to compensation being given for prospective damage to land of the claimant's injuriously affected, not confining the claim to the land which the Company were entitled to purchase. But I think that the right to compensation extends to any land of the claimant injured by the severance of that which is purchased, or by the works which the Company are authorised to construct; and the test is, whether the land which the claimant retains, can be proved to be injuriously affected by this severance, or by these works. The right to compensation depends on 'cause and effect,' not on distance or proximity." Lords Cranworth, Wensleydale, and Kingsdown concurred with the Lord Chancellor.[2]

831. In another case, a question of difficulty arose, whether a submission, which, as originally framed, expressly contemplated statutory procedure, was changed into an ordinary common-law submission by the terms in which the parties proceeded to revise and carry on the submission after it had lapsed. The parties had not only renewed the fallen submission, but further added words which, taken *per se*, imported a new contract of submission. It would appear that, in such circumstances, where the parties intend, in the new submission, to continue any special statutory provision which is restrictive of the common law, they require to express such intention in terms so clear as to place it beyond all doubt.

832. A Railway Company and a tenant submitted two claims of damages at the tenant's instance, one of which only was competent under a purely statutory submission. They expressly limited the endurance of the submission to three months, and declared "that this submission shall be held to have been entered into, under and by virtue of 8 Vict. c. 19 (Lands Clauses (Scotland) Act); and the said arbiters and oversman, and the said parties hereto, shall, under this submission, have the powers and privileges and rights conferred on them by the said Act." After the arbiters had named an oversman, and adopted certain procedure, the submission fell by the lapse of three months, without an award. The parties then indorsed a minute

[1] Caled. Ry. Co., 3 Macq. 814.

[2] *Ibid.* 815. For other topics adverted to, see opinion. Mr. Macqueen's report of this case was not quoted *supra*, p. 224, note, etc., as it had not been published at the time when these sheets were passing through the press. See *supra*, p. 224, opinion of L. Wensleydale as to an arbiter's power to remit to a man of skill.

on the submission, whereby they "renew the within submission, and empower the arbiters and oversman before named, to proceed in and determine the matters submitted, in the same way as if such submission had never expired: And further, the said parties-submitters do hereby, of new, submit and refer to the amicable decision, final sentence, and decreet-arbitral to be given forth and pronounced by the said Hugh Watson and Peter Christie, as the arbiters appointed by the parties, and in case of difference of opinion between the said arbiters, to the said James Horne as oversman, the whole claims of the parties, as especially mentioned in the within written submission." Certain further procedure then followed, but three months again elapsed without an award. For some short time thereafter, orders were made by the arbiters, which were obeyed by the parties. Notes of opinion were then issued by the arbiters, which the tenant considered unfavourable. He thereupon raised a wakening of an action of damages, which embraced one of the two claims which had been submitted. The Railway Company pleaded that the action was included in the submission, which was still pending, because the new submission was made at common law, and contained no limit of endurance; so that it would subsist for forty years, if an award was not sooner pronounced. The tenant answered, that the renewal indorsed on the submission was a mere repetition, *idem per idem*, of the original submission, including therefore a special reference to the statute, and an express limitation of endurance to three months; and that any acts of alleged homologation were entirely inadequate to rear up a submission of forty years' endurance, if the renewed submission, independently of such acts, was only to last for three months. The question came under the consideration of five Judges, three of whom held that the new submission was a submission which contemplated common-law procedure only. It contained a substantive submission *de novo*, over and above a separate clause of renewal of the original submission; and it appointed not only the arbiters, but also the oversman, which last could not be done by the parties in a statutory submission. It had also embraced, from the first, a claim which was not competent in a purely statutory submission. It was, therefore, substantially a new submission at common law, and must last for forty years, unless an award were sooner pronounced, as it contained no limit of endurance. Two of the Judges held that, according to the true understanding of the parties, the original submission had just been repeated over again, for a term of three months; and that any acts of alleged homologation were quite insufficient to rear up a submission with an endurance of forty years. The Court, by a majority, held the submission to be still subsisting; and the action in Court to be consequently excluded.[1]

[1] Hill, July 16, 1852, 14 D. 1034.

833. When a party, interested in lands taken by a Railway Company, entered into a submission for adjusting the amount of compensation to be paid to him, but the submission proved abortive, it was held, that whether the submission was considered as a statutory arbitration, or as an ordinary submission, it did not preclude the party from taking the measures provided by the 36th section of the Lands Clauses Act (8 & 9 Vict. c. 19), for the purpose of obtaining the verdict of a jury upon his claim,[1] unless it should be otherwise adjusted in one of the modes contemplated by that section.

834. But after two successive submissions between a tenant and a Railway Company, in both of which the tenant had recovered claims of damages, in respect of successive portions of his farm having been taken by the Company, the Court granted an interdict against his proceeding, under the Lands Clauses Act, to seek a trial by jury for the purpose of disposing of claims, which either were, or should have been, stated by the tenant under the previous submissions. It was at the same time observed, that the Court "could not, under any circumstances, make the question, what fell under a submission, an inquiry before a jury."[2]

835. The powers of a referee, named in a statute, came under the consideration of the Court in a recent case. A private Act provided that a railway should be completed, under the superintendence and to the satisfaction of an engineer therein named; and that, when completed, it should be taken in lease, at the annual rate of four per cent. on such a sum of outlay as should be ascertained and fixed by the said engineer. The outlay was to embrace the cost of procuring the Act, and making the line. It was held, from the terms of the Act, that the legal character of the engineer was truly that of a Statutory referee. His decision, fixing the amount on which the foresaid annual interest was to be paid, was therefore held to be as unchallengeable as the award of an arbiter; and the question is reported to have been mooted, whether even a plea of the engineer having exceeded his powers, could be entertained in the case of a statutory referee.[3]

836. With respect to the class of questions which may competently be brought before the Statutory tribunal appointed under the Lands Clauses and Railways Clauses (Scotland) Acts,[4] it was observed, in a recent case, by L. Campbell, C., and concurred in by Lords Wensleydale and Chelmsford, "That this statutory tribunal is only established to give compensation for losses sustained, in consequence of what the Railway Company may do lawfully under the powers which the Legis-

[1] Falconer, Jan. 29, 1853, 15 D. 352.
[2] Per L. J. Clerk Hope, in N. Brit. Ry. Co., June 4, 1852, 14 D. 832.
[3] Stirling and Dunfermline Ry. Co., July 11, 1856, 18 D. 1230.
[4] 8 & 9 Vict. c. 19; 8 & 9 Vict. c. 33.

lature has conferred upon them; and that, for anything done in excess of these powers, or contrary to what the Legislature, in conferring these powers, has commanded, the proper remedy is a common-law action in the Common Law Courts." The observation was applied to a case in which it was alleged against a Railway Company, that, after having rendered a private railway impassable, they had failed to implement their statutory [1] obligation to restore, or provide a substitute for, the private railway, within twelve months. A plea was stated, in defence, "that the pursuer was confined for a remedy to the statutory tribunal which the Legislature has provided, where losses are sustained in the formation of railways." The plea was repelled; the Lord Chancellor observing, "That the Company were guilty of a wrong in disobeying the Act of Parliament, which requires the restoration of the pursuer's branch railway; and for this wrong they are liable to an action *ex delicto*."[2]

837. It would appear that yearly tenants, seeking compensation for injury done by a Railway Company, in the execution of their works, are not entitled to compel the Company to submit the question to statutory arbitration, but must make their application to the Sheriff. Where a railway was carried across a stream, a claim of compensation was made by the occupants of a bleachfield and dyework using the stream, who alleged that the water had been polluted by the operations of the Company, during the construction of their line, so as to be rendered unfit for the purposes of bleaching or dyeing. The claimants were tenants from year to year. Their premises were situated at a considerable distance below the point at which the stream was crossed by the railway. The claimants commenced the procedure, requisite for having the question of compensation disposed of by arbitration, under the Lands Clauses, etc., Acts. The Railway Company then presented a note of suspension and interdict, maintaining, that as the claimants were merely tenants from year to year, they had no right to insist upon arbitration procedure, but were bound to apply to the Sheriff under sec. 114 of the Lands Clauses Act. This plea was sustained, although the claimants contended that, by the express terms of sec. 114, it only applied to cases where the tenant "required to give up possession of any lands" occupied by him, which they had not been required to do. The section was held to apply to the case, and it was observed that the claimants must be dealt with as tenants from year to year, and must seek relief under the provisions of the Lands Clauses Act applicable to yearly tenants; and, if well founded in fact, the claim is to be settled as provided in the 114th section of that Act, which declares that the

[1] 8 & 9 Vict. c. 33, sec. 49.

[2] Caled. Ry. Co., Aug. 3, 1860; 3 Macq. 838; July 2, 1859, 21 D. 1108. See also Samuel, Mar. 3, 1849, 11 D. 968.

compensation for damage done to yearly tenants, and the amount of such compensation, shall be determined by the Sheriff, in case the parties differ."[1]

838. Questions of difficulty have occasionally arisen respecting arbitration procedure, conducted in terms of rules which the Legislature authorised Friendly Societies to render compulsory on their members. By 33 Geo. III. c. 54 (now repealed), a Friendly Society, being empowered to make rules, not repugnant to the common law, was held entitled to make a rule that all disputes between the members, or between the Society and the widows of deceased members, should be settled by arbitration, to the exclusion of Courts of law.[2] This was held, although, in one instance, all the referees were to be members of the Society; and although the widow of a member, insisting in a disputed claim against the Society, objected that any rule must be repugnant to the common law, and therefore invalid, which made a party (the members of the Society) the judge in his own cause, by imposing him on the opposite party, as a compulsory referee.[3]

839. Among the various statutes which have prescribed arbitration procedure for determining certain special classes of cases, it may be noticed that the Act 1 & 2 Vict. c. 98, for the conveyance of mails by railways, provides that any dispute regarding the compensation to be paid to the Railway for the conveyance of the mails, is to be settled by arbitration.[4] By 7 & 8 Vict. c. 85, which enables the

[1] Per L. J. Clerk Hope, the other Judges concurring, in Caled. Ry. Co., Jan. 27, 1855, 17 D. 312.

[2] Cooper, Mar. 11, 1825, 3 S. 454; Manson, June 5, 1840, 2 D. 1015.

[3] L. Moncreiff expressed great difficulty respecting this decision. Manson, *supra*. See 18 & 19 Vict. c. 63 [now repealed], requiring the rules of Friendly Societies to be now approved and certified by the statutory Registrar. See also 23 & 24 Vict. c. 58 [also now repealed. With regard to the settlement of disputes, see Friendly Societies Act (1875), 38 & 39 Vict. c. 60, secs. 22 and 30, § 10. The last mentioned provision neutralises in certain limited cases the effect of an objectionable rule of the kind mentioned in the text. Generally, however, such a rule may still be competently made under sec. 22 of the above Act, and under sec. 34 of the Building Societies Act (1874), 37 & 38 Vict. c. 42; but it is worthy of note that the last named section provides, that, where the rules of the society direct disputes to be referred to arbitration, without prescribing a mode of electing arbiters, a general meeting of the society shall appoint arbitrators who are "not beneficially interested, either directly or indirectly, in its funds."—In the recent case of M'Kernan *v.* Greenock Lodge of Operative Masons, March 19, 1873, 11 Macph. 548, L. Deas observed, that, even where the jurisdiction of the Court is excluded by the rules of a friendly society, the Court might in certain cases interfere to compel its strict observance of these rules. In Davie *v.* Friendly Society of Colinton, Nov. 10, 1870, 9 Macph. 96, it was held that a question of law did not fall within a rule providing for the settlement of disputes by arbitration. See also Pratt's Law of Friendly Societies, by Brabrook (9th ed., 1876), pp. 164-168; Davis on Building Societies (2d ed., 1874), pp. 148-164.

[4] Secs. 6, 7, 9, 16, 17, 18.

Lords Commissioners of the Treasury, in certain circumstances, to become the purchasers of railways, it is provided, sec. 2, that the Railway Company may require the price to be adjusted by arbitration. If disputes arise between a Railway Company and the owner of any locomotive engine, or of any carriage using their line, respecting the fitness of such engine or carriage for being used on the railway, it is provided by 8 & 9 Vict. c. 33,[1] that such dispute shall be settled by arbitration. Still more recently, the Act 22 & 23 Vict. c. 59, has been passed for enabling Railway Companies to settle their differences with other Companies by arbitration. The mode of arbitration, which is made applicable, by the Master and Workman Act, to a large class of important questions, has been already shortly noticed.[2] There are other statutes, not easily admitting of enumeration, which, by supporting arbitration procedure in particular departments, afford ample proof of the practical utility of that extra-judicial tribunal, and of the high importance attached to it by the Legislature.[3]

CHAPTER XIV.

FOREIGN AWARD.

840. A FOREIGN submission and award, taken together, being just a foreign personal contract, will be held valid in Scotland, provided that they have been so executed as to be valid according to the *lex loci contractus*.[4] This is an exemplification of the general rule of international law, stated by Erskine, that "all personal obligations or contracts, entered into according to the law of the place where they are signed, or, as it is expressed in the Roman law, *secundum legem domicilii vel loci contractus*, are deemed as effectual, when they come to receive execution in Scotland, as if they had been perfected in the Scottish form."[5]

[1] Secs. 108, 110. [2] *Supra*, p. 9. [3] [See note 2, p. 374.]

[4] "The decree (arbitral) having been made out of Scotland, and in England, it would, according to the law of Scotland in such a case, be, in my opinion, sufficient to give it validity, that it was well and duly made, in conformity to the rules of the law of England, applicable to such an instrument."—Per L. Wood, in E. of Hopetoun, *infra*, sec. 848. A large majority of the Court concurred in the view thus expressed; which, moreover, appears to be necessarily included within the terms of the interlocutor pronounced by the Court.

[5] 3 Ersk. 2. 40; Story's Confl. (ed. 1835), c. 8, secs. 242 and 260 [7th ed., 1872]; La Pine, Feb. 14, 1721 (4451); Fortoun, Jan. 19, 1610 (4429); Mr. of Salton, July 5, 1673 (4431); York Buildings Co., Jan. 31, 1783 (4472). "Effect was given to a decree-arbitral pronounced at the Cape of Good Hope," Dec. 9, 1814, Dennistoun, Buchanan, and Co. Parker's Syn. xxxiv. 113: excerpt from Note-book of L. Pres. Boyle.

841. Provided that the award creates nothing but personal obligations, *hinc inde*, this rule will hold, even although the obligations which the award imposes should bind one or other of the parties to execute a conveyance, or other deed, affecting Scottish heritage. The mere personal obligation, being all that is contracted abroad, may be competently proved in Scotland, by producing that written evidence of the contract which would be held good in the country where the contract was made.[1]

842. But, if the award goes further, and purports directly to affect Scottish heritage, it will, to that effect, be invalid in Scotland, unless it be executed in such form as the law of Scotland itself requires in respect to any deed, executed in Scotland, for the purpose of conveying Scottish heritage. This is in accordance with one of the established rules of international law, as applicable to all deeds whatever. The laws which regulate the forms of deeds directly affecting heritable estate within any country, are its own laws alone.[2]

843. With respect to the grounds of challenge to which a foreign award should be held liable, it would appear that the Scottish Act of Regulations 1695, cannot afford the rule, as that has no force *extra territorium*, and the contract was made beyond its sphere.[3] But the true and legitimate force of every personal contract (including its power of resisting legal challenge), should be that (and that only) to which the parties mutually agreed, when consenting together and making their contract.[4] Generally speaking (though not always), they could then have in view only the law of the place where the contract was entered into, as affixing to it its legal attributes, including its power of resisting legal challenge. And if, therefore, in the country where a sub-

[1] Govan, Dec. 10, 1790 (4476), and Bell's 8vo Cases, 223; Cuninghame, July 5, 1706 (4462). See also observations by L. Curriehill, in E. of Hopetoun, Mar. 6, 1856, 18 D. 749; and by L. Cowan, Ordinary, in note to interlocutor in same case, *ibid.* 745.

[2] 3 Ersk. 2. 40. "A writing which is valid *secundum legem loci actus*, is valid everywhere, unless it be a conveyance of real property, situated in a country different from that in which the writing is executed."—Per L. Curriehill, in E. of Hopetoun, *infra*, sec. 848. "A personal obligation cannot be annulled or varied by change of place." "If a man living in England should grant an obligation in the English form to give heritable security in Scotland for a debt, the obligation against his person, being valid and binding according to the *lex loci contractus*, is a good ground upon which he may be sued in Scotland in terms of the obligation,—being, in short, a binding obligation all the world over."—Per L. Pres. Campbell, in Montgomery, June 9, 1795, 1 Ross, L. C., 8*.

[3] It is true that, in one of the editions of Erskine, there is a note to 4. 3. 35, which observes: "The Act of Regulations will be applied to a decree-arbitral pronounced in a foreign country, if execution is sought on it in Scotland." But it is not thought that any authority exists for this doctrine, and the two cases referred to by the annotator do not support it. These cases are noticed *infra*, sec. 847, note 1.

[4] Story's Confl. (ed. 1835), c. 8, secs. 263, 266, etc. [7th ed., 1872].

mission and award were executed, the rule prevailed that the award should be challengeable for error in judgment on the part of the arbiter, it should equally be challengeable on that ground when produced in a Scottish Court. Otherwise, the original contract of the parties, in place of being simply enforced in Scotland, according to its own native character and attributes, would be changed upon the parties, and a new and modified contract would be imposed upon them in its stead, to which they had never mutually agreed. But such a result would appear to be contrary to the fundamental principle, that all contract-obligation is based upon the reciprocal consent of parties; and, if so, it would seem to involve some misapplication of the principles of international law. If, on the other hand, an award was not challengeable by the *lex loci*, on the ground of the arbiter's mere error of judgment, it would, on that account (and not because of the Scottish Act of Regulations), appear entitled to receive the same full measure of protection when pleaded in a Scottish Court, and would be held equally unchallengeable here.[1]

844. In the case of Johnstone,[2] as reported in the Faculty Collection, these views were supported by the course which was adopted by the Court. An award which had been pronounced in Holland, under a submission which was there entered into, was founded upon in the Scottish Courts. It was objected to, and a reduction of it was brought, on the head of iniquity, as being ill-founded on the merits; and it was maintained that if this could be shown, to the satisfaction of the Scottish Courts, the *comitas gentium* could not be carried so far as to compel these Courts to become the instruments of injustice, by enforcing an award which they were satisfied was erroneous. The Court at first found that the award "was challengeable, and therefore allowed parties' procurators to be heard upon the merits thereof." But afterwards their Lordships held it requisite to ascertain more fully the law of Holland, with regard to the privilege there allowed in challenging awards. A case was accordingly laid before Dutch counsel, who stated that, in Holland, awards were "not challengeable." After considering this opinion, the Court pronounced this interlocutor:—"Repel the reasons of reduction of the decreet-arbitral; assoilzie the defender from that process; and find the pursuers liable to him in the full sums awarded by the decreet-arbitral."

845. The opinions of the Judges are not given by Mr. Wylde, in reporting the case in the Faculty Collection. This is the more to be regretted, as it is stated in Hailes' Dec., p. 730, that "on 10th December 1776, 'the Lords assoilzied' in general; waiving the general point, whether this cause ought to be tried by the law of Holland. As to this, Monboddo and President (Dundas) expressed their doubts. I

[1] Story's Confl., sec. 263 (5), etc.; sec. 267, etc., [7th ed., 1872].

[2] Dec. 13, 1776 (Dicty. Arbn., Appx. 4).

have made this memorandum for preventing any mistake." No note of the opinions at this advising is given by L. Hailes; but, on examining the short note of opinions which were expressed at the first advising of the case, on 4th February 1775, and which have been preserved by L. Hailes, they indicate that one opinion of Dutch counsel had been then obtained, which purported that, according to the law of Holland, execution might be allowed to follow on the award, upon caution. At this advising, some of the Judges concurred with L. Kennet, who observed: "I do not see the necessity of giving way to the forms of Holland in finding caution." Nevertheless, the interlocutor of the Court "found that the decreet-arbitral is challengeable, but must, in the meantime, be carried into execution, Dr. Johnstone finding caution."

846. Apparently this interlocutor was fully in accordance with the Dutch opinion then before the Court. The notes of L. Hailes further show, that "an additional case and opinion thereon of Dutch counsel" had subsequently been obtained, and laid before the Court, after which they assoilzied in general, as already noticed. It is this last opinion, which, as the Faculty reporter states, "mentioned decrees-arbitral not to be challengeable;" adding that "this opinion being laid before the Court, they pronounced an interlocutor, repelling the reasons of reduction of the decree-arbitral, and assoilzieing Dr. Johnstone from that process, and found the executors and trustees of Mr. Crawford liable to him in the full sums awarded by the said decree-arbitral."

847. It may be noticed, also, that the opinion of the L. President Dundas, who, as Hailes records, expressed "doubts" about applying the law of Holland, is reported by Hailes, at the first advising, to have been thus expressed: "If the decree-arbitral can be opened, we are not bound to observe all the forms of the Courts in Holland. Why should we give more force to this decree than to the decree of any foreign Court?" To this L. Kames replies: "A decree of a foreign Court is, with us, no more than a judgment, which may be supported upon equity; but there is a difference between a *decreet* and a *contract*, which is *juris gentium*." It thus appears that the doubt expressed by the L. President was incidentally rested upon the hypothesis that a decreet-arbitral was *not* a contract; and that it may be probably inferred that his Lordship would not have hesitated to apply the law of Holland, if he had viewed the decree-arbitral as a contract. The only other Judge who is mentioned as having, at the last advising, expressed a doubt as to applying the law of Holland, was L. Monboddo. The ground of his Lordship's doubt is not stated; but his name is mentioned in immediate conjunction with that of the L. President, and not improbably his ground of doubt was the same with that of the L. President. The Session Papers in this case are not in the Library. On the whole, it would seem that the history of the case, when

examined, authorises that use of the Faculty Report of it which is made in the text.[1]

848. In a recent case, a question was raised, of some apparent novelty, regarding the authentication of foreign awards. The award was improbative, according to the law of Scotland. It had been executed, however, in England; and, after some discussion, three questions were framed, on which their Lordships of the First Division consulted the other Judges. 1. Whether the award required to be executed according to the forms of the law of Scotland. 2. Whether, though not so executed, the Court could enforce an award which they "are satisfied is authentic, and does truly and correctly express the final decree of the oversman?" 3. Whether, in determining on the validity of the award, it was necessary to have recourse to the law of England? In dealing with these questions, especially the latter two questions, upon general principles, very considerable diversity of opinion was expressed by the Judges; several of their Lordships holding, that although the award might not be authenticated either according to the law of England or of Scotland, it should nevertheless be sustained, if the Court, upon examination, were satisfied of its genuineness and authenticity. Eventually the Court did not require to pronounce a decision disposing of the legal principle thus announced, because an opinion was obtained from English counsel, who stated that the award was sufficiently authenticated according to the law of England; after which the Court repelled the objections founded on nonconformity to the law of Scotland, and found that the award was sufficiently authenticated.[2]

[1] In a previous case, where an English award was brought under suspension on the head of iniquity, parties were at issue, whether, by the law of England, such a plea was inadmissible, as well as by the law of Scotland. The case was affected by some specialties; *inter alia*, the submission was executed in the Scottish form, and the award contained a clause of registration for execution in Scotland. The Court, on considering a proof before answer, held that the alleged iniquity "was, at least, extremely doubtful," and decided the case *super totam materiem;* refusing the suspension, but without stating the precise ground of their judgment.—Ochterlony, Aug. 8, 1754 (4470). An earlier stage of this case, under date Nov. 15, 1748, is reported in Elchies' Arbn. 8, who mentions that the Court were much divided in opinion. It will be observed that the case of Johnstone is posterior to Ochterlony.

[2] E. of Hopetoun, Mar. 6, 1856, 18 D. 739. The interlocutor of the Court was couched in rather peculiar terms. It is not rested specially on the fact that the award was valid by the *lex loci;* on the contrary, the interlocutor, while it is framed so as to include that ground of judgment, is not at all exclusive of the more general doctrine, which was elicited from several of the Judges in answering the second and third questions above mentioned. It is in these terms:—"In conformity with the opinions of the majority of the Judges, find that, to give validity to a decree-arbitral pronounced by Mr. Taylor (oversman) in England, under the submission in question, it was not essential that such decree should be contained in an instrument duly authenticated according to the forms which the law of Scotland would require in such an instrument, if executed in Scotland; and that this Court can take cognisance of, and competently interpone its authority to, a decree-arbitral contained in an instrument signed by Mr. Taylor in England, which the Court are

849. In these circumstances, as it cannot be held that the doctrine in question has yet been supported by a decision of the Court, and as there was much difference of opinion elicited from the Judges, it may be permitted to remark that the doctrine not only appears to be novel in itself, but, if admitted, would seem to infer large consequences. It would involve the result, that an English award, though invalid in point of formality, both by the law of England and by the law of Scotland, would nevertheless be held valid, in point of formality, when pleaded in the Courts of Scotland, in virtue of some undefined test of authentication, which (whatever else it might be) was expressly negatived by the municipal laws of both countries. Such a doctrine seems scarcely to be reconcilable with the general rule laid down by Story, "that all the formalities, proofs, or authentications of contracts, which are required by the *lex loci*, are indispensable to their validity everywhere else."[1] It is only in virtue of the *comitas gentium* that a foreign contract, which is not valid by the forms of the law of Scotland, is pleadable in the Courts of Scotland at all. In the intercourse of nation with nation, it is indeed matter of practical necessity, that personal contracts, duly made in one country, shall be recognised as valid in another; otherwise, all commerce between the subjects of different kingdoms would be at an end. But, in general, every practical purpose is well and safely attained, when a foreign Court allows to a foreign contract as much validity as that contract would possess in the land of its nativity, by the *lex loci*. It seems beyond the true principle of *comitas* to go further. In fact, it is only when parties in any country, at home or abroad, comply with the forms of their own municipal law, when framing their contract, that they give satisfactory proof of their serious intention to be firmly bound thereby. When they follow an opposite course, and neglect the forms of their own municipal law; when they only employ such a form of contract as they presumably know to be *not* binding, since it is not binding by the *lex loci;* such proof of their intention to be firmly bound by it, is not only wanting, but a counter presumption might even be said to arise. And when they neither observe the forms of the *lex loci*, nor the forms of the country where the contract is to be executed, it is difficult to see on what principle the Courts of the latter country should hold themselves either bound or entitled to set up a new, undefined, and uncertain standard of authentication, which may apparently vary in each successive case, for the purpose of determining by that fluctuating standard the validity of important contracts. It would seem, with deference, to deserve consideration, whether the tendency of such a doctrine was

satisfied is authentic, and does truly and correctly express the final decision of the oversman, although such instrument is not authenticated according to any forms other than have been observed in regard to the instrument in question."

[1] Confl., c. 8, sec. 260, [7th ed., 1872].

consistent with the maintenance of international law upon a sure and firm foundation.

850. In determining how far the *lex loci* is fairly applicable in sustaining the validity of a contract, in point of authentication, the circumstance whether the parties, at entering into the contract, contemplated that it was to receive execution in another country, as well as various other analogous circumstances, have been often taken into view. In the recent case of the Earl of Hopetoun, just adverted to, a question arose as to the authentication of an award pronounced by an arbiter in England, acting under a submission which was framed in the Scottish form, and in which the parties were a Scottish proprietor and his tenants, under certain mineral leases. Various important features of the transaction, having a Scottish aspect, presented themselves, which were pressed on the attention of the Court, in support of the plea that the award was invalid, in consequence of not being authenticated in the form required by the law of Scotland. These, however, were not held sufficient to prevent the international rule from applying, which dispensed with the observance of Scottish forms, in framing an award in England. The circumstances above referred to were recapitulated in the opinion delivered by L. Curriehill in the following terms: "The submission upon which the decrees-arbitral proceed is an instrument duly authenticated by the solemnities prescribed by the law of Scotland; by expressly providing for the mode in which the arbiter was to ascertain the law of Scotland, the submitters showed their own understanding that the questions in dispute depended, to some extent, on that law; the deed of submission contains a warrant by the parties-submitters to record the decree-arbitral to be pronounced thereon, in the Books of Council and Session, for the purpose, *inter alia*, of execution by diligence in the Scottish form proceeding thereon; the subject of the leases and agreements out of which the questions to be decided had arisen, was situated in Scotland; Scotland is the country in which the decrees, so far at least as they relate *ad facta præstanda*, behove to be executed; and the decrees contain clauses directing them to be registered, in terms and for the purposes specified in the deed of submission. As already stated, these circumstances do not appear to me to import an agreement between the parties, that the instrument containing the decreet-arbitral should be authenticated by the English arbiter, with the Scottish solemnities." In this view the Court necessarily concurred, when they pronounced the interlocutor above quoted, sustaining the award as duly authenticated.

851. On the whole, when a foreign award is viewed in its true light, of being a personal contract, it would not appear that any greater difficulties should occur in determining questions as to the enforcement of it in Scotland, than are found to occur in the enforcement of any other foreign personal contract here.

APPENDIX.

APPENDIX.

No. I.

EXAMPLE OF A COMMON FORM OF GENERAL SUBMISSION TO A SOLE ARBITER.

WE,[1] A. B. (designed), on the one part, and C. D. (designed), on the other part, have submitted and referred, as we hereby submit and refer, all claims, disputes, questions, and differences, presently depending and subsisting between us, to the amicable decision, final sentence, and decree-arbitral, to be pronounced and given forth by Y. Z. (designed), arbiter mutually chosen by us; with power to the said arbiter to receive claims, take all manner of probation which he may think necessary, by writ, witnesses, or oath of party, for deciding the matters hereby submitted, and to hear parties thereon; as also to decern against either party, in whole or in part, for payment of the expenses which may be incurred by the other party under this submission, including the remuneration of the clerk to the submission; as also including the expense of the deed of submission itself, and of the decree or decrees-arbitral to follow hereon, and of the registration of the same, respectively; and whatever the said arbiter shall determine in the premises, in whole or in part, by decree or decrees-arbitral, whether interim or final, to be pronounced by him between and the day of next, or on or before any other day to which he may prorogate this submission, which he is hereby empowered to do at pleasure, we bind and oblige ourselves, and our respective heirs, executors, and successors, to acquiesce in, implement, and fulfil to each other, under the penalty of pounds sterling, to be paid by the party failing to the party observing, or willing to observe, the same, over and above performance: And it is hereby declared, that although either or both of us, the said A. B. and C. D., shall die during the dependence of the present submission, the same shall nevertheless continue in full force, and be, with the decree or decrees-arbitral to be

[1] The parties-submitters are frequently set forth in the *third* person, in place of the *first*, as in the example of the special submission, *infra*, p. 409. But some provisions of a submission may apparently be expressed with more succinctness and precision when the parties speak in the first person.

pronounced as aforesaid, binding upon the heirs and representatives of the party or parties deceasing; the said arbiter being hereby empowered to proceed with this submission, notwithstanding the death of either party, or of both parties, as aforesaid:[1] And further, we
5 hereby agree, that in case no final decree-arbitral shall follow hereupon, all probation to be taken by the said arbiter shall be held and received as legal probation, *quantum et quale*, in any after submission or process at law between us, or our respective foresaids, touching the premises: And we consent to the registration hereof, and of the pro-
10 rogations, and decree or decrees-arbitral, to follow hereon, for preservation and execution.—In witness whereof, these presents, written upon this and the (*three*, or other number) preceding pages of stamped paper, by M. N. (designed), are subscribed by us at (*Edinburgh*, or other place), the (*first*, or other) day of (*July*, or other month), eighteen
15 hundred and (*seventy-eight*, or other) years, before these witnesses, E. F. (designed), and G. H. (designed).

(Signed) A. B.
(Signed) C. D.

(Signed) E. F., witness.
(Signed) G. H., witness.

No. II.

EXAMPLES OF SOME VARIATIONS ON THE ABOVE STYLE, WHICH ARE OF FREQUENT OCCURRENCE.

1. *Heritable Rights.*

Where heritable rights and interests, as well as moveable, are to be brought before the arbiter, it would seem advisable to add, after the word "differences" (p. 403, l. 3), the following or similar words: "heritable or moveable, real or personal."

2. *Proof upon Commission.*

If it be desired to give express power to the arbiter to take proof upon commission (see *supra*, p. 161), the following words may be introduced immediately after the word "thereon" (p. 403, l. 9): "the said arbiter being hereby empowered to take the proof foresaid, in so far as it shall seem to him to be expedient, by means of a commissioner, duly authorised by him to that effect; with power also to decern," etc.

[1] A provision is occasionally introduced here, to the effect that the submission shall not fall by the bankruptcy of either party; but this is unnecessary, as the submission remains in force by the ordinary course of law, without any such provision. The clause had originally been inserted at a time when the effect of a party's bankruptcy had not yet been settled.

3. *Employment of Men of Skill.*

If the parties further wish to give special power to the arbiter to call in the aid of men of skill, in place of leaving that matter to rest on his implied powers, the following clause may be immediately subjoined to that last mentioned: "and being further empowered to make such remits to men of skill as he may find necessary, in duly preparing himself for the performance of his duty as arbiter foresaid; with power also to the said C. to decern," etc.

4. *No Power to pronounce Part or Interim-Awards.*

Where it is not intended to give power to the arbiter to pronounce part-awards, or interim-awards, but only a final award, the clause commencing with the words, "and whatever" (p. 403, l. 15), will run as follows: "and whatever the said arbiter shall determine in the premises, by decree-arbitral to be pronounced," etc.: the clause in the example being deleted between the foresaid words, "and whatever," and the word "pronounced." The subsequent references to "decrees-arbitral," in the plural number, will likewise be omitted.

5. *No Power of Prorogation, and duration of Submission to be limited.*

If it is not intended to confer a power of prorogation of the submission upon the arbiter, the sub-clause, commencing with the words, "or on or before," etc. (p. 403, l. 18), and ending with the words, "at pleasure," will be omitted. If, moreover, the duration of the submission is not meant to extend to one year, the following words, "the day of next" (p. 403, l. 17, 18), would require to be omitted, and the last day of the contemplated endurance of the submission should be inserted in their room.

6. *Submission to fall on Death of either Party.*

When it is intended that the submission is to fall upon the death of either party, the clause commencing with the words, "And it is hereby," etc. (p. 403, l. 24), and ending with the words, "parties as aforesaid," will be omitted.

7. *No provision as to future use of Proof taken.*

If parties do not wish to make any special provision as to the future use of the proof to be taken under the submission, the clause will be omitted which commences with the words, "And further" (p. 404, l. 4), and which ends with the word "premises."

8. *No consent to Summary Diligence.*

Where parties do not agree that summary diligence may be raised on the award, they will omit the registration clause.

9. *No Expenses to be awarded against either Party.*

If it be intended that no expenses shall be awarded against either party, it would be necessary to omit the clause relative thereto, commencing with the words, "as also to decern," etc. (p. 403, l. 9), and ending with the words, "the same, respectively." It would further be necessary to introduce a clause, expressly declaring that the arbiter should possess no power to find either party liable to the other in any expenses; because the power of awarding expenses belongs impliedly to the arbiter, wherever it is not expressly excluded. The liability of the parties to pay a suitable remuneration to the clerk of the submission stands on a different footing from that for the expenses of process. The liability to the clerk is a debt due by both and each of the parties, conjunctly and severally; and the only restraint relative to it, which the arbiter should allow the parties to impose, would seem to be, that they, in questions *inter se*, shall each be liable for one-half only of the clerk's account, both and each being liable *in solidum* to the clerk for his whole account.

These are examples of some of the ordinary variations upon the above style of a general submission of mutual claims to a sole arbiter, which are of frequent occurrence. Where the claims are all on one side, the corresponding variation in the style does not appear to call for any exemplification.

No. III.

GENERAL SUBMISSION OF MUTUAL CLAIMS TO TWO ARBITERS, AND TO AN OVERSMAN NAMED IN THE SUBMISSION.

We, A. (designed), on the one part, and B. (designed), on the other part, have submitted and referred, as we hereby submit and refer, all claims, disputes, questions, and differences, presently depending and subsisting between us, to the amicable decision, final sentence, and decree-arbitral, to be pronounced and given forth by C. (designed) and D. (designed), arbiters mutually chosen by us; and, in case of difference of opinion between the said arbiters, by E. (designed), as oversman; with power to the said arbiters, or oversman, respectively, to receive claims, take all manner of probation which they or he may think fit, either by writ, witnesses, or oath of party for determining

the matters hereby submitted, and to hear parties thereon; as also to decern against either party, in whole or in part, for payment of the expenses which may be incurred by the other party under this submission, including the remuneration of the clerk to the submission; as also including the expense of the deed of submission itself, and of the decree or decrees-arbitral to follow hereon, and of the registration of the same; and whatever the said arbiters or oversman, respectively, shall determine in the premises, in whole or in part, by decree or decrees-arbitral, interim or final, to be pronounced by them or by him, respectively, between and the day of next, or on or before any other day to which they or he may respectively prorogate this submission, which they and he are empowered to do at pleasure, we bind and oblige ourselves and our respective heirs, executors, and successors, to acquiesce in, implement, and fulfil to each other, under the penalty of pounds sterling, to be paid by the party failing to the party observing, or willing to observe, the same, over and above performance: And it is hereby declared, that although either or both of us, the said A. and B., shall die during the dependence of the present submission, the same shall nevertheless continue in full force, and be, with the decree or decrees-arbitral to be pronounced as aforesaid, binding upon the heirs and representatives of the party or parties deceasing; the said arbiters and oversman, respectively, being hereby empowered to proceed with this submission, notwithstanding the death of either party, or of both parties, as aforesaid: And further, we hereby agree, that in case no final decree-arbitral shall follow hereupon, all probation to be taken by the said arbiters or oversman shall be held and received as legal probation, *quantum et quale*, in any after submission, or process at law, between us or our respective foresaids, touching the premises: And we consent to the registration hereof, and of any prorogations, and devolution, and decree or decrees arbitral, whether interim or final, to follow hereon, for preservation and execution.—In witness whereof, these presents, written upon this and the (*three*, or other number) preceding pages of stamped paper, by F. (designed), are subscribed by us at (*Edinburgh*, or other place), the (*first*, or other) day of (*July*, or other month), eighteen hundred and (*seventy-eight*, or other) years, before these witnesses, G. (designed) and H. (designed).

(Signed) A.
(Signed) B.

(Signed) G., witness.
(Signed) H., witness.

Note.—The more ordinary variations on this style of submission are the same with those which occur on the preceding style, for which reference is made to pp. 404-406, *supra*.

1. *Contingency of Non-acceptance or Death of Oversman named.*

Where it is intended to provide against the contingency of the oversman's non-acceptance, or of the occurrence of his death before he has given a final award, the following words will be introduced immediately after the words "as oversman" (p. 406, l. 42): "And, in the event of the failure of the said E., through his non-acceptance, or through his death after acceptance, but at any time before giving forth a final award, then to any other oversman who shall thereon be chosen by the said arbiters, with power," etc. The employment of such a clause as this would seem to guard against the risk of a submission falling, as adverted to *supra*, p. 188, sec. 349.

2. *Nomination of Oversman left to Arbiters.*

It often happens, in a submission to two arbiters and an oversman, that the nomination of the oversman is left to be made by the arbiters themselves. In that case, the clause of submission to the arbiters and oversman, after the word "differences" (p. 406, l. 38), will run as follows: "presently depending and subsisting between us, to the amicable decision, final sentence, and decree-arbitral, to be pronounced and given forth by C. (designed) and D. (designed), arbiters mutually chosen by us; and, in case of their differing in opinion, by an oversman who shall be chosen by the said arbiters; with power," etc. The rest of the submission would thereafter run as in the example already given on p. 406.

Where it is thought desirable that the arbiters should appoint the oversman *in limine*, the following words should be added immediately after the above word "arbiters," viz.: "who are hereby specially requested to nominate an oversman before they enter on the business of the submission; with power," etc.

If it be intended to make such pre-nomination an indispensable act on the part of the arbiters, and, further, to ascertain the oversman's willingness to accept, before they themselves proceed with the submission, the clause would require to have its terms varied accordingly.

3. *Submissions by Curators, Trustees, etc.*

There is a class of variations upon the style of a submission, which arise from the circumstance that the parties to the contract are not in the position of persons acting for themselves, but are tutors, curators, trustees, or a quorum of tutors, curators, or trustees, or the like, acting for others than themselves. But there is nothing peculiar in the contract of submission, more than in any other con-

tract, to render it expedient to give examples of the relative style of the submission appropriate to such specialties. It will only be observed, that in all cases where a representative party intends to bind his constituent only, or his constituent's estate, and to be himself free from personal obligation, special care should be taken that the words employed admit of no doubtful interpretation in this particular.—See *supra*, p. 118, sec. 209.

4. *Special Power to Arbiter to enforce his Orders.*

It would appear that a provision is occasionally introduced into a submission, giving special powers to an arbiter in dealing with either party who fails to obtemper an order within the time specified. But, where parties are not satisfied with the implied powers on this subject, which belong to the arbitral office, and wish to make special rules for themselves, any relative variations of style must depend so much on the view which they take of their interests in each particular case, and especially on the degree of confidence which they place in the particular arbiter, that probably no common style would be available.

No. IV.

EXAMPLE OF A COMMON FORM OF SPECIAL SUBMISSION TO A SOLE ARBITER.

The parties following, viz., A. (designed) and B. (designed), considering that, for some time past, they have had various transactions in business with each other, in the course of which they reciprocally granted occasional pecuniary accommodation to each other; and that the said A. is now the holder of a retired bill for £500, dated the 30 day of , drawn by the said B. upon and accepted by the said A., payable two months after date; and that, on the one hand, the said A. claims payment from the said B. of the foresaid sum of £500, with interest thereon from and after the day of , when the said bill was retired by the said A.; in respect that, as the 35 said A. alleges, his acceptance foresaid was not granted on account of any debt due by him to the said B., but solely for the pecuniary accommodation of the said B., who received the proceeds of the said bill, and was bound to have retired the same; whereas, on the other hand, the said B. denies that the foresaid sum of £500, or any part 40 thereof, is due by him to the said A., inasmuch as the foresaid acceptance was granted, as the said B. alleges, in payment of part of a larger balance then due to him by the said A.; and further, considering that the said A. and B. have mutually agreed that this difference of theirs shall be settled by arbitration: Therefore the said A. and B. have 45

submitted and referred, as they hereby submit and refer, their aforesaid difference to the amicable decision, final sentence, and decree-arbitral, to be pronounced and given forth by C. (designed), arbiter mutually chosen by the said A. and B., to the end that he may determine whether the foresaid sum of £500, or any part thereof, with the interest thereon, is due by the said B. to the said A.; with power to the said C. to receive claims, take all manner of probation he may think fit, by writ, witnesses, or oath of party, and, *inter alia*, to call for all books, accounts, letters, and documents relative to the foresaid bill, or to the transactions of the said A. and B. in business with each other, and to hear the parties thereon, etc.

The rest of the submission will run in the same terms with that of the general submission to a sole arbiter, after the word "thereon," occurring at p. 403, l. 9, *supra*.

Note.—It will frequently happen that no introductory explanation is desirable, and that the submission runs as follows:—

The parties following, viz., A. (designed) and B. (designed), have submitted and referred, as they hereby submit and refer, etc. (the special subject in dispute is then set forth).

No. V.

EXAMPLE OF SUBMISSION OF A DEPENDING ACTION TO A SOLE ARBITER.

The parties following, A. (designed), on the one part, and B. (designed), on the other part, considering that the said A. raised a summons against the said B., which was dated and signeted on the day of , concluding (state conclusions briefly, and add, "all as more fully set forth in the said summons itself, which is hereby referred to and held as repeated *brevitatis causa*"); to which action the said B. lodged defences (state them briefly, and add, "all as more fully set forth in said defences, hereby referred to and held as repeated *brevitatis causa*"); and now seeing that, in place of further insisting in said process in Court, the said A. and B. have agreed to submit the said process, and whole claims and defences therein, *hinc inde*, to arbitration: Therefore the said A. and B. have submitted and referred, as they hereby submit and refer, the foresaid process, and whole claims and defences therein, *hinc inde*, to the amicable decision, final sentence, and decree-arbitral, to be pronounced and given forth by C. (designed), as sole arbiter, with power to the said C. to receive claims, take all manner of probation which he may think fit, and to hear the parties thereon," etc., as at p. 403, l. 9. If the process was in an advanced stage, the style, perhaps, might more appropriately be, "with power to the said C. to consider the said process, hear parties

thereon, and take all manner of probation thereanent, or otherwise proceed therein as to him shall seem proper," etc.

Note.—When stating the arbiter's power over the subject of expenses in such a submission, it should be declared that it shall extend both over the expenses which have been incurred in the process, and also over the expenses of the submission,—the latter being stated in terms similar to those already quoted.

A clause is frequently inserted in the submission of an Outer House process, to the effect that it shall not be held to be abandoned or asleep, though not moved in for upwards of a year; and that no process of wakening shall be requisite, if it ultimately becomes necessary to insist in the process in Court. But this clause is now of less moment, since the Act 13 & 14 Vict. c. 36, § 30 (amended by 31 & 32 Vict. c. 100, § 95), has given so great facility for wakening a process.

In the submission of a process of Suspension, the Cautioner for the suspender should be made a party. Even in a Judicial Reference, the importance of making the Cautioner a consenting party has been already noticed, *supra*, p. 284. In an extra-judicial submission, the following, or a similar clause, should be added to the submission, immediately before the registration clause: "And for implement of whatever the said arbiter shall determine, under the above submission, so far as incumbent on the said A. (suspender), the said F. hereby binds and obliges himself, his heirs, executors, and successors, conjunctly and severally with the said A.; and the said F. further consents that, in case no decreet-arbitral shall follow hereon, the bond of caution by him, lodged in the said process of suspension, shall remain in full force and effect."[1]

No. VI.

EXAMPLE OF A GENERAL SPECIAL SUBMISSION TO A SOLE ARBITER.

The parties following, A. (designed), on the one part, and B. 35
(designed), on the other part, have submitted and referred, as they hereby submit and refer, to the amicable decision, final sentence, and decree-arbitral, to be pronounced and given forth by C. (designed), as sole arbiter, all claims, disputes, differences, and debateable matters, presently subsisting between them, on any account or occasion what- 40
ever; and particularly, without prejudice to the foresaid generality, the following subject of difference, viz.: Whether the said B. is owing the whole, or any part, of the sum of £500, contained in a bill for that amount, dated the day of , drawn payable

[1] See 2 Jurid. Styles, ed. 1826, p. 165 (ed. 1865, p. 259).

at two months after date by the said B., upon, and accepted by, the said A., who retired the same when due, and who now claims payment of the said £500 from the said B., with interest from the day of , when the bill was retired as aforesaid; the said A. alleging that his acceptance was not granted on account of any debt due by him to the said B., but solely for the pecuniary accommodation of B., who received the proceeds of the bill, and was bound to have retired the same; which allegations are denied by the said B., who maintains that the foresaid acceptance was granted by the said A., on account of a debt justly due to him by the said A.; with power to the said C. to receive claims," etc.

The rest of the submission will run as in the example of the special submission, *supra*, p. 410, l. 7.

Note.—There may be many variations on this style of submission: some of the more common of these are analogous to the variations noted *supra*, pp. 404-406.

No. VII.

FORM OF ACCEPTANCE OF THE OFFICE OF ARBITER, INDORSED ON THE SUBMISSION.

(Date.)

"I (name and designation of arbiter), hereby accept of the office of arbiter conferred on me by the within submission."

(Signature of Arbiter.)

Note.—The acceptance, like all the other procedure, is free of technicality, and is often even more briefly expressed.

Where there are more arbiters than one, the acceptance runs, of course, in the plural number, and is signed by each of the arbiters.

Where the acceptance is not indorsed on the submission, it must specially describe the particular submission to which it applies, so as to identify it.

A minute of acceptance is so important, that it should either be holograph of the arbiter, or tested; although an improbative acceptance would be equally binding, after it had been acted upon.

No. VIII.

APPOINTMENT OF THE CLERK TO THE SUBMISSION, AND ORDER FOR CLAIMS.

It is common to appoint the clerk to the submission at the same time when the arbiter accepts his office. Frequently also, the arbiter,

in the same deliverance, orders Claims, or a Claim and Answers, to be lodged by the parties, using the following or similar terms :—

(Date.)

"I hereby accept of the within submission, and appoint K. (designed) to be clerk thereto. Further, I appoint the claimant A. (designed) to lodge a written statement of his claim, within days, and allow the Respondent B. (designed) to see and answer the same within days thereafter. Each party is hereby enjoined to produce, with his own paper, all the written evidence in his possession on which he means to found."

(Signature of Arbiter.)

Note.—If the arbiter thinks fit to direct that each paper is to contain an explicit statement of facts, with a note of pleas subjoined, or otherwise to prescribe the form of the paper ordered, the interlocutor (or a note appended to it) will be so expressed as to convey the requisite direction. And if an arbiter considers that a preliminary meeting with the parties, to hear their explanations or admissions, may be useful before ordering a claim and answers, or mutual claims, the order made will vary accordingly. There appears to be no other requisite for the style of such orders, except that they be plain and perspicuous. The same remark applies to orders for revisal of Claims, for minutes of debate, where these are thought requisite, etc.

No. IX.

ORDER WHERE THE ARBITER THINKS IT EXPEDIENT TO PROCEED UPON A CLOSED RECORD.

(Date.)

"The arbiter having considered the revised Claim, No. , and the revised Answers, No. , with the productions and whole process: Appoints parties to attend him at , on (*Monday*, or other day) next, at o'clock, for the purpose of adjusting and closing the record."

(Signature of Arbiter.)

At the meeting at which the record is closed, the following form will suffice, if no other order is to be made at the same time :—

(Date.)

"Record closed."

(Signature of Arbiter.)

No. X.

ORDER FOR HEARING.

(Date.)

"The arbiter hereby appoints parties to be heard before him on the whole cause (or as the case may be), at on the day of next, at o'clock."

(Signature of Arbiter.)

It may be noticed that it is immaterial whether deliverances by the arbiter run in the first person or in the name of "the arbiter," as in the above instance. They do not require to be holograph or tested.

No. XI.

ORDER ALLOWING A PROOF.

(Date.)

"The arbiter having considered the closed record, and the productions made by the parties respectively, allows the parties a proof of their respective averments, and to each party a conjunct probation; the claimant A. to commence his proof on the day of next, at o'clock. Further, the arbiter respectfully recommends to the Lords of Council and Session (or to the Sheriff, as the case may be), to grant warrant for citing witnesses and havers, on the application of either party."

(Signature of Arbiter.)

When several diets of proof are required, they are successively appointed by the arbiter, according to circumstances. In many cases, the first diet of the respondent's proof may be fixed in the same order which appoints the claimant's.

Where proof is to be taken by a Commissioner, a clause will be introduced into the above interlocutor, immediately before the recommendation to the Court, which will "grant commission to N. (designed) to take the said proof; due premonition of days being always given to both parties or their agents, before proceeding with a diet of proof; the said proof to be reported to the arbiter, by the day of ."

No. XII.

PETITION FOR WARRANT TO CITE WITNESSES AND HAVERS.

When it becomes necessary to cite witnesses and havers, a summary petition is addressed to the Sheriff, setting forth the subsistence

of the submission; stating that it has become necessary to lead a proof before the arbiter; quoting the arbiter's order allowing a proof, and also his recommendation to the Court to grant warrant for citing witnesses and havers, where such recommendation has been granted; stating that certain witnesses and havers require to be cited; and praying for warrant "to cite witnesses and havers for the petitioner, and particularly to cite" (any witnesses and havers specified in the petition are here mentioned) "to appear before the said Arbiter" (at the place specified in the Arbiter's order), "to give evidence for the petitioner, and to produce such writings in their possession as relate to the subject-matter of the foresaid submission; and that on" (the time specified in the Arbiter's order), "or on any other day or days to which diets of examination may be prorogated; and failing their so attending, when duly cited, then to grant Letters of Second Diligence at the petitioner's instance; or to do otherwise or further in the premises," etc.

Note.—Either the Arbiter's Order, or the copy thereof, intimated to the petitioner, should be produced with the petition. It will be observed, that a specification of the writings which are called for from any haver must be served upon the haver when he is cited. He has the same privilege in objecting to produce writings which are covered by confidentiality, etc., which would belong to him when examined in a Court of law. In like manner, a witness has the same privilege in declining to answer questions covered by the plea of confidentiality, etc., which would belong to him when examined in a Court of law.

No. XIII.

TERMS OF OATH TO BE ADMINISTERED TO A WITNESS.

The oath which is administered to a witness, under a submission, is the same simple, solemn, and appropriate oath which is administered in a Court of law, viz.: "I swear by Almighty God, and as I shall answer to God, at the great Day of Judgment, that I will tell the truth, the whole truth, and nothing but the truth."—See *infra*, XVI., Note.

No. XIV.

PETITION TO THE SHERIFF WHERE A WITNESS, OR HAVER, REFUSES TO ANSWER, OR TO PRODUCE.

In the event of a witness refusing to answer a question which the arbiter has ordained him to answer, or to produce a document which

the arbiter has ordained him to produce, a summary petition may be presented to the Sheriff, as explained *supra*, p. 354 *seq.*, to ordain him to answer, or to produce.

In the case of Blaikies, referred to in the text, the Statement of Facts annexed to the petition, set forth the subsistence of the submission, and the necessity which had arisen that the petitioners should lead a proof before the arbiter, and should recover certain documents, contained in a specification which was quoted at length. The petition then stated that the arbiter, on considering the said specification, had pronounced an interlocutor (which was quoted at length), by which he "authorised Messrs. B. (petitioners) to petition the Judge Ordinary, in terms of their said note and specification; and the arbiter respectfully recommends to his Lordship to grant the prayer of their petition; the proof and examination to commence in the arbiter's office on the day of , with continuation of days."

(Signed by the Arbiter) A. G.

The statement of facts then further set forth, that the Sheriff, on application, had "granted letters of diligence in terms of said specification, which are herewith produced;" that, "on 13th August 1851, Mr. N. F., agent of the said Company (the other party-submitter), was examined as a haver before the said arbiter, in virtue of the said diligence and execution thereof, which is also herewith produced. He was required to produce all the writings in his possession, mentioned in the first and second heads of the said specification." The statement then bore that the haver refused to obey this requisition, on the ground of alleged confidentiality, in respect that he had received the papers in question as the law-agent of the foresaid Company. The statement then quoted two Orders, dated 13th August 1851, by which the arbiter ordained the haver to produce certain writings and books called for. The report of the diligence, containing the *res gesta* and the arbiter's orders, was produced with the petition. The prayer of the petition was, that the Sheriff should appoint service upon the Company, and upon the haver, their agent, and answers within a short space, if they were so advised; and thereafter, "with or without answers, to interpone your authority to the Order issued by the said arbiter, on 13th August 1851, upon the said N. F., to produce all letters or writings mentioned in the specification served upon him in the said submission between the petitioners and respondents, and specially referred to in the deposition of N. F. before the said A., as arbiter foresaid, upon said 13th August 1851, which is herewith produced; and also to interpone your authority to the Order issued by the said arbiter, on said 13th August 1851, upon the said N. F., to produce the Letter Book, or any other Book, kept for, or on behalf of, the Aberdeen Railway Company (the respondents), that excerpts may be

taken therefrom, as mentioned under the fourth head of said specification, and also specially referred to in said deposition of said N. F.; and to ordain the said N. F. to implement the said Orders, and to produce the writings called for by the petitioners, and ordained by the arbiter in his Orders foresaid, to be produced by him; and that, within a short time, and failing production of the said writs, to grant warrant to apprehend and incarcerate the said N. F., until he shall produce the same, or to do otherwise as to your Lordship shall seem just."

After a record was made up, the petition was refused as incompetent in the Sheriff-Court; but, in an advocation, it was held to be competent, and the case was remitted to the Sheriff-Court, that the application might be granted, if well founded on the merits.—See *supra*, p. 355.

No. XV.

PETITION TO THE COURT OF SESSION FOR WARRANT TO CITE HAVERS IN ENGLAND, TO DEPONE BEFORE A COMMISSIONER NAMED BY AN ARBITER.

A party-submitter presented a petition to the Court of Session, setting forth that the arbiter had allowed both parties a proof, and that, on the arbiter's recommendation, the Sheriff had granted warrant for letters of diligence against witnesses and havers generally, and specially for the recovery of certain writings contained in a specification which was fully quoted in the petition; that, in the course of the examination of havers, it appeared that the books, letters, and papers of a certain firm had been removed from Renfrew to Birmingham, and the petitioners had reason to believe that this was done in order to place these documents beyond the reach of the diligence at the petitioner's instance; but that, at all events, it was material to their case to recover extracts from these books, etc., now in England; that they had accordingly presented a note to the arbiter, who had pronounced an interlocutor (quoted at length) by which he "appoints the Mayor or Town-Clerk of Birmingham his commissioner in Birmingham, and the Lord Mayor of London, or Thomas W. Webster, Esquire, parliamentary agent there, his commissioner in London, for taking the deposition of havers resident in these places, in terms of the specifications formerly lodged (by petitioners), and narrated in said note; and the arbiter respectfully recommends to the Lords of Council and Session, and also to the Judge Ordinary of Aberdeenshire, to grant letters of diligence in terms of said specification; to sanction and confirm the appointment of the said commissioners named by the arbiter; and to require and enforce the attendance of havers before said commissioner or commissioners."

(Signed by Arbiter) A. G.

The petition to the Court further set forth, that it was of the utmost consequence to the petitioners to secure the attendance and examination of the partners of the foresaid firm, and of their managers and clerks, and others in their employment, as havers, before the commissioners; and it therefore prayed the Court "to sanction and confirm the appointment of the commissioners named by the arbiter, and to grant warrant for letters of diligence at the petitioner's instance, for citing havers, and particularly for citing the partners of the firm (foresaid), and their managers and clerks, and others in their employment, to appear before the said commissioners, or one or other of them, and to produce such writings, falling under the said specification, as they may respectively have in their custody and possession, or to do otherwise," etc.

The Court, upon an objection that there was a portion of the above prayer which craved authority to cite havers *generally*, required it to be limited to the partners and the managers, clerks, and others in their employment; after which their Lordships "interpone their authority, sanction and confirm the appointment of the commissioners named by the arbiter, and grant warrant for letters of diligence at the petitioner's instance, as prayed for."—See *supra*, p. 356, and 13 D. 1307.

No. XVI.

FORM OF TAKING PROOF ON COMMISSION.

At the day of , in presence of N. (designed), Commissioner appointed by a deliverance dated the day of , pronounced by C. (designed), arbiter under a submission between A. (designed) and B. (designed), dated the day of , to take the proof allowed by interlocutor of the said arbiter, dated the day of , compeared (state the parties or their procurators who appear). The said commissioner appointed R. (designed) to be his clerk.

Thereafter compeared S. (designed), who being solemnly sworn, and interrogated as a witness for the foresaid A., depones (the clerk writes down the statement of the witness, to the arbiter's dictation, or under his immediate superintendence).

Being cross-examined for the foresaid B., depones, etc. (taken down as before). Being re-examined for the said A., depones, etc. Being interrogated by the commissioner, depones, etc. All which is truth, as the deponent shall answer to God.

(Signed, on every page, by the witness, the commissioner, and the clerk.)

Note.—If the witness cannot write, his deposition will conclude

with a statement of the fact; such as, "and depones that he cannot write," etc.; thereby accounting for the absence of his signature.

If the witness objects, on conscientious grounds, to take any oath, this should be set forth on the record of the procedure, and that a solemn affirmation was administered to him, in terms of 18 & 19 Vict. c. 25; after which his declaration, in place of a deposition, will be recorded by the clerk, and signed as already mentioned. It is true that the Act refers only to witnesses "in any Court of civil judicature;" which terms do not apply to a submission. But no compulsitor would be granted by a court of law, against a witness, for refusing to take an oath before an arbiter, which he could not be compelled to take before a Court. Practically, therefore, the Act applies to arbitration procedure.

Where a witness does not object to all oaths, but merely to that form of oath which is administered in Scotland, the statute 1 & 2 Vict. c. 105, will be kept in view, which provides, in such a case, for the administration of an oath, "in such form, and with such ceremonies, as such person may declare to be binding."

When formal procedure is observed, the deposition of every witness, as taken down, is read over to him, slowly and distinctly, before he signs it, in order that he may have an opportunity of making any requisite explanation or correction. If a marginal addition be made to his deposition, it requires to be signed by himself, the commissioner, and the clerk.

When objections are taken to a witness, or to a part of his deposition, which the commissioner considers to be of sufficient importance to call for such a proceeding, he can take the deposition, or the part objected to, on a paper apart, and seal it up, to be transmitted to the arbiter, along with the report of the proof.

If the arbiter, on considering the objections, overrules them, he will then break the seal, and add the enclosed deposition to the rest of the proof.

It will often be found to conduce to perspicuity, if, in taking down the statement of a witness, he is made to speak in the first person.

Whenever a question is put in such a manner, that the true weight which is due to the answer may be liable to misapprehension by the arbiter, when reading the proof, unless the terms of the question be in his view at the same time, the commissioner should then cause both the question and answer to be recorded, and marked as in quotation. "Interrogated" (state the terms of the question). "Depones" (state the terms of the answer).

When a haver produces documents, his deposition will be made to describe them, or to refer specially to an inventory which describes them. The documents themselves should be docqueted and signed by the haver, the commissioner, and the clerk; or, where they are pro-

duced *per* inventory, the inventory will be so docqueted and signed while the relative documents are merely initialed. The haver's deposition sets forth the mode in which the writings are thus docqueted.

At the close of the proof, the commissioner subjoins the following, or similar words: "What is contained in this and the preceding pages, is the report of the commission, set forth in the first page hereof; respectfully reported by

(Signatures of Commissioner and Clerk).[1]

Where the proof is led by the arbiter himself, which is the ordinary case, he often makes mere notes of the evidence for his own use; or otherwise abridges the procedure. But as proofs are sometimes taken with formality, and on commission, the above form has been given.

When a proof promises to be long, it is frequently found matter of convenience, that the parties sign an agreement to hold the notes of the evidence, taken by a short-hand writer, in whose accuracy they have confidence, as being of the same validity in all respects as the signed depositions of the witnesses would have been. It is one of the advantages of arbitration procedure, that the parties can thus mould its form, so as to adapt it to the particular circumstances of the case with which they have to deal.

It should be mentioned, that although the administration of an oath *de fideli* to the clerk of an arbiter, or an arbiter's commissioner, seems inappropriate (*supra*, p. 289), as an arbiter is merely a private person, yet it is occasionally done by some arbiters and commissioners, who think this a prudent precaution, and in itself innocuous. The form of the oath thus administered is the following:—"I swear to be faithful in the office now committed to me."

The case of a Judicial Referee taking a proof is, in this respect, very different from that of an Arbiter. The Judicial Referee is clothed with a public trust, inasmuch as he is an officer of the Court, and leads a proof in a cause still pending in Court, under a commission from the Court. It is as appropriate that he should administer an oath *de fideli* to his clerk, as that any other commissioner, taking a proof under a remit from the Court, should do so.

No. XVII.

PETITION TO SHERIFF AGAINST A PARTY WHO DISOBEYS THE ARBITER'S ORDER TO RETURN DOCUMENTS WHICH HE HAS BORROWED UP.

Where a party borrows up any of the proceedings or productions in a submission, and refuses or delays to return them, although he has

[1] 2 Dickson (2d ed.) § 1354, *et seq.*; and Appx. No. 13, p. 1218; Shand, 348; Parker, 300.

been ordered by the arbiter to do so, a petition may be presented to the Sheriff by the other party, stating shortly the circumstances; specifying the documents which are kept up; producing the receipt for said documents by the party complained of; quoting the order (or repeated orders) of the arbiter ordaining him to return said documents to the clerk of the submission, which he still refuses to do; and also quoting the arbiter's recommendation to the Court to grant the application. The petition prays the Sheriff to appoint this petition to be served upon the said B. (the party complained of), in common form, and to ordain him to lodge answers thereto, within a certain short space; and, thereafter, upon resuming consideration hereof, with or without answers, to decern and ordain the said B. forthwith to return the foresaid documents to the clerk of the said submission; and to find the said B. liable in the expense of this application; or to do otherwise in the premises as to your Lordship shall seem just.

According to justice, etc.

If a decree be pronounced in terms of the prayer of the petition, personal diligence may be raised on it against the party complained of, who may be subjected to imprisonment so long as he shall contumaciously retain the documents in question.—See Gordon, June 9, 1835; Scottish Jurist, vol. vii. p. 404.

No. XVIII.

JOINT MINUTE OF JUDICIAL REFERENCE.

This is done by lodging in process a joint minute, signed either by the parties themselves, or by their counsel, agreeing to refer the process to a person named and designed, as judicial referee, and craving the Court to interpone their authority, and to remit the case to the referee. There is no particular style for such a minute. Mr. Shand, in his "Practice of the Court of Session,"[1] quotes the following terms as affording an ordinary example of an interlocutor interponing the authority of the Court: "The L. Ordinary interpones authority to the minute of reference for the parties, and in terms thereof, remits the process to A. B., as judicial referee therein. Grants warrant to the said referee to take such probation as the justice of the case may require; grants diligence against witnesses and havers, and appoints him to report his opinion to the Lord Ordinary *quam primum.*

[1] 401.

No. XIX.

REPORT TO THE COURT BY JUDICIAL REFEREE.

The steps of procedure before a judicial referee are so analogous to those before an arbiter, that no examples of them seem requisite. The Report by the referee, being his Award upon the case, is substantially the same with an arbiter's award, but does not contain any words of style, appealing to God and a good conscience; and it is necessarily modified by the circumstance that it is addressed directly to the Court. The following is given as an ordinary example, taken from a process which was judicially referred, as it will show at least the general tenor of such a Report.

(Date.)

"The judicial Referee, having accepted of the Reference contained in the foregoing Minute and Interlocutor by the L. Ordinary, and having considered the proceedings, and the productions in process; and having subsequently heard the evidence of witnesses for the parties, in support of their respective pleas, and considered the productions made during the course of the Reference; and having thereafter heard counsel for the parties on the proof and on the whole cause; and being well and ripely advised on the whole matter, Finds, first, that," etc. The merits of the cause, and the expenses, both of the process and the reference, including the fees due to the clerk of the referee, were then disposed of by the referee, in a series of findings, as in an interlocutor of Court; after which the Report proceeded as follows: "and humbly reports to the Lord Ordinary this Award, in order that his Lordship's authority may be interponed, and decree pronounced conform thereto." (Signature of Referee.)

No. XX.

FORM OF A PROROGATION, WRITTEN ON THE DEED OF SUBMISSION.

(Date.)

"I hereby prorogate the within submission to the day of next." (Signature of Arbiter.)

The minute of prorogation is often expressed less concisely, in terms similar to the following:—

(Date.)

"In virtue of the powers conferred on me as arbiter, by the within submission, I (arbiter's name and designation) hereby prorogate the time for determining the same to the day of next."

(Signature of Arbiter.)

Note.—Where the prorogation is not written on the same sheet with the submission, it is necessary to describe the submission to which it applies, by such particulars as will clearly identify it. Considering the importance of the minute of prorogation, it seems advisable that it should either be holograph of the arbiter or probative; but this is not necessary. See *supra*, secs. 329, 330.

No. XXI.

PROROGATION OF A SUBMISSION MADE BY THE PARTIES-SUBMITTERS.

When the prorogation of a submission is made by the parties-submitters in consequence of no power of prorogation having been conferred on the arbiters, it should be done in the form of a probative writ (*supra*, sec. 326), and may be of similar tenor to the following, when written on the same sheet with the submission.

We, A. and B., the parties to the within submission, hereby prorogate the time for determining the said submission to the day of next; and we of new submit and refer the whole matters contained in said submission to the amicable decision of the within designed C., as sole arbiter, and bind and oblige ourselves to implement any decree or decrees-arbitral to be pronounced by him; renewing hereby the whole powers and clauses (except as to the period of endurance) contained in said submission, and here held as repeated *brevitatis causa*.—In witness whereof, etc. (adding testing-clause and signatures).

No. XXII.

MINUTE OF NOMINATION OF AN OVERSMAN, INDORSED ON THE SUBMISSION.

In virtue of the powers conferred on us, the arbiters under the within submission, we hereby nominate and appoint M. (designed) to be Oversman, in the event of our hereafter differing in opinion respecting the matters submitted to us.—In witness whereof (testing-clause and signatures of arbiters and witnesses).

Note.—Where the submission requires the nomination to be made before the arbiters enter on the matters referred to them, the following, or some similar, variation may be used:—

We, the arbiters under the within submission, in accordance with the provision in that behalf contained in said submission, do hereby,

before entering on the matters referred to us, nominate and appoint M. (designed) to be oversman, etc. (as in preceding style).

No. XXIII.

MINUTE OF DEVOLUTION UPON AN OVERSMAN ALREADY APPOINTED.

We, the arbiters under the within submission, having differed in opinion regarding the determination of the matters submitted to us, do hereby, in virtue of the powers committed to us as arbiters foresaid, devolve the said submission, and whole matters therein contained, upon M. (designed), the oversman appointed by us, by our minute of date the day of .—In witness whereof, etc. (testing-clause and signatures of arbiters and witnesses).

Note.—In place of using the above words, "devolve the said submission upon M.," etc., the style frequently runs, "refer the whole matters contained in said submission to the determination of M.," etc.; or the like. When the arbiters have decided part of the matters submitted, and therefore have only to devolve the remainder, great care is requisite that the devolution shall precisely include all that has been left undecided by the arbiters, and nothing else. The following, or some similar style, would provide for this:—

We, the arbiters under the within submission, having, in virtue of powers conferred on us to that effect, decided part of the matters submitted to us, conform to our two interim decrees-arbitral, dated respectively the day of , and the day of ; but having differed in opinion regarding the other matters submitted to us, do hereby devolve the foresaid submission, and all the matters therein contained, in so far as not decided by one or other of the two interim decrees-arbitral foresaid, upon M., oversman appointed by us, conform to our minute of date the day of .—In witness whereof, etc. (testing-clause and signatures of arbiters and witnesses).

Note.—The variations in the above styles, which may be requisite in consequence of combining the nomination of an oversman, and the devolution of the submission upon him, in one minute, or of the oversman having been originally named in the submission, or the like, are obvious. It seems advisable, in consequence of the importance of the minute of devolution, that it should be executed as a probative writ. But this is not essential (*supra*, sec. 352).

No. XXIV.

MINUTE SISTING A NEW PARTY IN A SUBMISSION, WHERE IT IS INTENDED THAT HE SHALL BE THEREBY BOUND EQUALLY WITH THE ORIGINAL PARTIES.

I, A. (designed), do hereby sist myself as a party in the within submission, to the same effect in all respects as if I had been a party originally subscribing the contract of submission itself; and I bind and oblige myself, my heirs, executors, and successors, to implement and fulfil whatever shall be determined, in whole or in part, by decree or decrees, interim or final, to be pronounced by the arbiter under the said submission, and that under the penalty expressed in said submission, over and above performance; and I consent to the registration hereof, along with the said submission, and any prorogations thereof, as well as the decree or decrees-arbitral to be pronounced therein for preservation and execution, all in the terms and for the purposes expressed in said submission.—In witness whereof, etc. (testing-clause and signatures of party and witnesses).

Note.—This procedure is of rare occurrence. See Baillie, p. 49.

No. XXV.

MINUTE SISTING THE REPRESENTATIVE OF A PARTY DECEASED.

I, A. (heir or executor, etc.) of the now deceased B., one of the parties to the within submission, do hereby sist myself, in the room and place of the said deceased B., as a party to the said submission. —In witness whereof, etc. (testing-clause and signature of party and witnesses).

No. XXVI.

EXAMPLE OF A DECREE-ARBITRAL BY A SOLE ARBITER.

I (name and designation), sole arbiter appointed under a deed of submission between A. (designed), on the one part, and B. (designed), on the other part, dated the day of , whereby they submitted to my determination a claim for payment of the sum of £ sterling, made by the said A. against the said B., as being the balance of the intromissions of the said B. with the rents of the estate of D., belonging to the said A., on which estate the said B. had been the factor of A. for a term of years; all as more fully set forth in the

said deed of submission, which is hereby referred to for its own tenor; having accepted of the said submission, conform to my acceptance, indorsed on the submission, and dated the day of ; and having, moreover, prorogated the same, conform to my prorogation, dated the day of , also indorsed on said submission: Considering that, after a Claim was lodged by the said A., to which Answers were lodged by the said B., I allowed both parties a Proof, which was accordingly led in my presence; and that parties were thereafter heard before me on the whole cause; and being now well and ripely advised on the matters submitted to me, and having God and a good conscience before my eyes, I do hereby give forth and pronounce my final sentence and decreet-arbitral as follows: I find that the said B. is liable to the said A. in payment of the sum of £ sterling, being the balance of the rents of the foresaid estate of D. still remaining in his hands, under his intromissions foresaid, with interest on said sum of £ at the rate of per cent., from the day of till payment: I also find the foresaid B. liable to the said A. in payment of the expenses of this submission, including the remuneration of the clerk to the submission, which I hereby modify to the sum of £ sterling, with interest on said last-mentioned sum at the rate of per cent., from this date until payment; and I hereby decern and ordain the said B. to make payment of the two respective sums of £ and £ aforesaid, with interest on each of said sums as aforesaid; and on the said B. implementing to the said A. this my decreet-arbitral, I hereby decern and ordain the said A. to execute at his own expense, and deliver to the said B., a formal and valid discharge of all claims at his instance against the said B., either in respect of his foresaid intromissions as factor, or of this decreet-arbitral; and I decern and ordain both parties to implement and fulfil this decreet-arbitral, in all points towards each other, under the penalty contained in the said submission, over and above performance; and I hereby appoint the foresaid deed of submission, with my said acceptance thereof, the foresaid prorogation, and this my final decreet-arbitral, to be registered in the Books of Council and Session, or others competent, all in terms and to the effect of the consent to registration, contained in said deed of submission.—In witness whereof, etc. (testing-clause and signatures of arbiter and witnesses.)

Note.—In those cases in which it has been expressly agreed in the submission that the expense of executing the contract of submission, and of recording it along with the decree-arbitral, should be within the disposal of the arbiter, special findings on these subjects should be inserted in the decree, in disposing of the question of expenses. The decree-arbitral of an Oversman will carefully narrate the fact that the arbiters had differed in opinion, and had then devolved the

submission on him. It will specify their minute of devolution by referring to its date. See *supra*, pp. 244, 245.

An Interim Decree-Arbitral will be specially designated as such, by the use of the word "Interim" in place of the word Final. It should also narrate that the arbiter had been empowered to pronounce Interim Decrees-Arbitral, and that (after such brief statement of the circumstances as may seem expedient) he saw fit to pronounce the following interim decree.

No. XXVII.

ARBITRATION CLAUSES OF THE COMPANIES CLAUSES CONSOLIDATION (SCOTLAND) ACT, 8 & 9 VICT., C. 17.

And with respect to the settlement of disputes by arbitration, be it enacted as follows:— *Arbitration.*

Sec. 131. When any dispute directed by this or the special Act, or any Act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall, by writing under his hand, nominate and appoint an arbitrator to whom such dispute shall be referred; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation; and if, for the space of fourteen days after any such dispute shall have arisen, and after a request in writing shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure, the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case, the award or determination of such single arbitrator shall be final. **Appointment of arbitrators when questions are to be determined by arbitration.**

Sec. 132. If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, or refuse, or for seven days neglect, to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place; and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator, so to be substituted as aforesaid, shall have the same powers and authorities as were vested in the former arbitrator, at the time of such his death, refusal, or disability as aforesaid. **Vacancy of arbitrator to be supplied.**

Arbitration.

Appointment of umpire.

Sec. 133. Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters so referred to them, nominate and appoint by writing under their hands, an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse, or for seven days neglect to act, they shall forthwith after such death, refusal, or neglect, appoint another umpire in his place; and the decision of every such umpire, on the matters so referred to him, shall be final.

Board of Trade empowered to appoint an umpire, on neglect of the arbitrators.

Sec. 134. If in either of the cases aforesaid, the said arbitrators shall refuse, or shall for seven days, after request of either party to such arbitration, neglect to appoint an umpire, it shall be lawful for the Lord Ordinary, on the application of either party to such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final.

Power of arbitrator to call for books, etc.

Sec. 135. The said arbitrators, or their umpire, may call for the production of any documents in the possession or power of either party, which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses, on oath, and administer the oaths necessary for that purpose, and may also grant diligence for the recovery of such documents as either party may require, or for citing witnesses; and on application to the Lord Ordinary, letters of supplement, or such other writ as may be necessary, shall be issued by the Lord Ordinary in support of such diligence.

Costs to be in the discretion of the arbitrators.

Sec. 136. Except where, by this or the special Act, or any Act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration, to be determined by the arbitrators, shall be in the discretion of the arbitrators or the umpire, as the case may be.

No. XXVIII.

ARBITRATION CLAUSES OF THE LANDS CLAUSES CONSOLIDATION (SCOTLAND) ACT, 8 & 9 VICT. C. 19.

Dispute as to compensation may be referred to arbitration.

Sec. 20. If no agreement be come to, between the promoters of the undertaking, and the owners of, or parties by this or the special Act enabled to sell and convey, any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, it shall be lawful for the parties to refer the same to arbitration.

If claim does not exceed £50, to be settled by the Sheriff.

Sec. 21. If the compensation claimed and disputed shall not exceed fifty pounds, unless both parties agree to refer such compensation to arbitration, the same shall be settled by the Sheriff. . . .

Sec. 23. If the compensation claimed or offered in any case shall exceed fifty pounds, and if the party claiming such compensation desire to have the same settled by arbitration, and signify such desire to the promoters of the undertaking, before they have presented their petition to the Sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, by a notice in writing, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, then, within twenty-one days after the receipt of any such notice, from any party so entitled, the same shall be settled by arbitration in the manner hereinafter provided.

Where compensation claimed exceeds £50, it may be settled by arbitration if claimant so desire.

Sec. 24. When any question of disputed compensation, by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbiter, each party, on the request of the other party, shall nominate and appoint an arbiter, to whom such dispute shall be referred; and every appointment of an arbiter shall be made, on the part of the Company, under the hand of the secretary or any two of the directors of the Company, and on the part of any other party, under the hand of such party, or if such party be a Company or Corporation, under the hand of the proper officer or person authorised by such Company or Corporation, and such appointment shall be delivered to the arbiters, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation; and if, for the space of fourteen days after any such disputes shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbiter, such other party fail to appoint an arbiter, then upon such failure, the party making the request, and having himself appointed an arbiter, may appoint such arbiter to act on behalf of both parties, and such arbiter may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbiter shall be final.

Appointment of arbiters when questions are to be determined by arbitration.

Sec. 25. If, before the matters so referred shall be determined, any arbiter appointed by either party die, or become incapable, the party, by whom such arbiter was appointed, may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that pur-

Vacancy of arbiter to be supplied.

pose, he fail to do so, the remaining or other arbiter may proceed *ex parte;* and every arbiter, so to be substituted as aforesaid, shall have the same powers and authorities as were vested in the former arbiter, at the time of such his death or disability as aforesaid.

Appointment of oversman.

Sec. 26. Where more than one arbiter shall have been appointed, such arbiters shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an oversman to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this, or the special Act; and if such oversman shall die, or become incapable to act, they shall, forthwith after such death or incapacity, appoint another oversman in his place; and the decision of every such oversman, on the matters on which the arbiters shall differ, shall be final.

Lord Ordinary empowered to appoint an oversman on neglect of the arbiters.

Sec. 27. If, in either of the cases aforesaid, the said arbiters shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an oversman, it shall be lawful for the Lord Ordinary, on the application of either party to such arbitration, to appoint an oversman, and the decision of such oversman, on the matters on which the arbiters shall differ, or which shall be referred to him under this or the special Act, shall be final.

In case of death of single arbiter, the matter to begin *de novo.*

Sec. 28. If, when a single arbiter shall have been appointed, such arbiter shall die, or become incapable to act, before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special Act, in the same manner as if such arbiter had not been appointed.

If either arbiter refuse to act, the other to proceed *ex parte.*

Sec. 29. If, when more than one arbiter shall have been appointed, either of the arbiters refuse, or for seven days neglect, to act, the other arbiter may proceed *ex parte,* and the decision of such arbiter shall be as effectual as if he had been the single arbiter appointed by both parties.

If arbiters fail to make their award within twenty-one days, the matter to go to the umpire.

Sec. 30. If, where more than one arbiter shall have been appointed, and neither of them shall refuse or neglect to act as aforesaid, such arbiters shall fail to make their award, within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose, by both such arbiters under this Act, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

Power of arbiters to call for books, etc.

Sec. 31. The said arbiters or their oversman may call for the production of any documents in the possession or power of either party, which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose, and take all evidence competent according to the Law of Scotland.

Sec. 32. All the expenses of any such arbitration and incident thereto, to be settled by the arbiters or oversman, as the case may be, shall be borne by the promoters of the undertaking, unless the arbiters or oversman shall award the same sum as, or a less sum than, shall have been offered by the promoters of the undertaking, in which case each party shall bear his own expenses incident to the arbitration; and in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decreet-arbitral or award in the Books of the Council and Session, shall be borne by the promoters of the undertaking.

Costs of arbitration, how to be borne.

Sec. 33. The arbiters shall make their decreet-arbitral or award in writing, and shall cause the same to be recorded in the Books of Council and Session, or shall deliver the same to the promoters of the undertaking, to be by them so recorded, and the said promoters shall, on demand, at their own expense, furnish an extract thereof, from the said books, to the other party to the arbitration; and extracts of decreets-arbitral or award shall bear faith in all Courts and cases, the same as the original writings, unless the originals be improven.

Award to be delivered to the promoters of the undertaking.

Sec. 34. No award, made with respect to any question referred to arbitration under the provisions of this or the special Act, shall be set aside for irregularity or error in matter of form.

Award not to be set aside for error in form.

Sec. 35. If the party claiming compensation shall not, as hereinbefore provided, signify his desire to have the question of such compensation settled by arbitration, or if, when the matter shall have been referred to arbitration, the arbiters or their umpire, shall for three months have failed to make their or his award, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided.

If arbitration or award not made within a limited time, compensation to be settled by a jury.

See also secs. 7 to 14, both inclusive; secs. 63 to 66, both inclusive; secs. 118 and 123.

No. XXIX.

ARBITRATION CLAUSES OF THE RAILWAYS CLAUSES CONSOLIDATION (SCOTLAND) ACT, 8 & 9 VICT. C. 33.

And with respect to the settlement of disputes by arbitration, be it enacted as follows:—

Sec. 119. When any dispute, directed by this or the special Act, or any Act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbiter, each party, on the request of the other party, shall nominate and appoint an arbiter to whom such dispute shall be referred; and every appointment of an arbiter shall be made, on the part of the Company under the hand of the secretary or any two of

Where questions are to be determined by arbitration, arbiters to be appointed within fourteen days after notice.

the directors of the Company, and on the part of any other party, under the hand of such party, or if such party be a Company or Corporation, under the hand of the proper officer or person authorised by such Company or Corporation; and such appointment shall be delivered to the arbiter, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party, to appoint an arbiter, such last-mentioned party fail to appoint such arbiter, then upon such failure the party making the request, and having himself appointed an arbiter, may appoint such arbiter to act on behalf of both parties; and such arbiter may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbiter shall be final.

Vacancy of arbiter to be supplied.

Sec. 120. If, before the matters so referred shall be determined, any arbiter appointed by either party die, or become incapable to act, the party, by whom such arbiter was appointed, may nominate and appoint in writing some other person to act in his place; and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbiter may proceed *ex parte;* and every arbiter, so to be substituted, as aforesaid, shall have the same powers and authorities as were vested in the former arbiter at the time of such his death or incapacity as aforesaid.

Appointment of oversman.

Sec. 121. Where more than one arbiter shall have been appointed, such arbiters shall, before they enter upon the matters so referred to them, nominate and appoint, by writing under their hands, an oversman to decide on any such matters on which they shall differ, or which shall be referred to them under this or the special Act; and if such oversman shall die or become incapable to act, they shall forthwith after such death or incapacity appoint another oversman in his place; and the decision of every such oversman, on the matters on which the arbiters shall differ, shall be final.

Lord Ordinary to appoint an oversman on neglect of arbiters.

Sec. 122. If in either of the cases aforesaid, the said arbiters shall refuse, or shall for seven days after request of either party to such arbitration, neglect to appoint an oversman, the Lord Ordinary, on the application of either party to such arbitration, shall appoint an oversman; and the decision of such oversman on the matters on which the arbiters shall differ, or which shall be referred to them under this or the special Act, shall be final.

Sec. 123. If, when a single arbiter shall have been appointed, such arbiter shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special Act, in the same manner as if such arbiter had not been appointed.

In case of death of single arbiter, matter to begin *de novo*.

Sec. 124. If, where more than one arbiter shall have been appointed, either of the arbiters refuse or for seven days neglect to act, the other arbiter may proceed *ex parte*, and the decision of such arbiter shall be as effectual as if he had been the single arbiter by both parties.

If either arbiter refuse to act, the other to proceed *ex parte*.

Sec. 125. If, where more than one arbiter shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbiters shall fail to make their award within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose by both such arbiters, under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

If arbiters fail to make their award within twenty-one days, the matter to go to the umpire.

Sec. 126. The said arbiters or their oversman may call for the production of any documents in the possession or power of either party, which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose, and may also grant diligence for the recovery of such documents as either party may require, or for citing witnesses, and on application to the Lord Ordinary, letters of supplement, or such other writ as may be necessary, shall be issued by the Lord Ordinary in support of such diligence.

Power of arbiters to call for books, etc.

Sec. 127. Except where by this or the special Act, or any Act incorporated therewith, it shall be otherwise provided, the expenses of and attending every such arbitration, to be determined by the arbiters, including the expense of recording the decreet-arbitral or award in the Books of Council and Session, and of furnishing extracts thereof from the said Books, shall be in the discretion of the arbiters or the oversman, as the case may be.

Expenses to be in the discretion of the arbiters.

Sec. 128. The arbiters or oversman, as the case may be, shall make the decreet-arbitral or award in writing, and shall cause the same to be recorded in the Books of Council and Session; and extracts of decreets-arbitral or awards, so recorded, shall make faith in all Courts and cases, in like manner as the original decreets-arbitral or awards themselves, except where the originals are offered to be improven.

Awards to be in writing and recorded;

Sec. 129. No award made in respect to any question referred to arbitration under the provision of this, or the special Act, shall be set aside for irregularity or error in matter of form.

Not to be set aside for matter of form.

No. XXX.

ARBITRATION CLAUSE OF 13 & 14 VICT. C. 36; AN ACT TO FACILITATE PROCEDURE IN THE COURT OF SESSION.

Sec. 50. And whereas it is expedient to extend the benefits of arbitration: Be it enacted, that if the parties in any cause before the Court of Session, in which an issue is to be tried, shall consent to refer the same to any one arbiter, or to any three, five, or seven arbiters, it shall be lawful for the Court, or the Lord Ordinary, and the Court or Lord Ordinary is hereby required, to allow such arbiter or arbiters to be sworn and to sit as a jury, to try such issue; and such arbiter or arbiters, or the major part of their number in the event of difference of opinion, shall have all the powers of a unanimous jury; and the proceedings of such trial shall be conducted, as far as may be, as in any ordinary case of trial by jury; either party being entitled to take exceptions, and to move for new trial, as in any ordinary case: Provided always, that it shall not be competent to either party to object to the verdict, or to move for new trial, in respect of the verdict being against evidence, or on any other ground implying miscarriage on the part of the jury alone: Provided also, that the Court, in the event of granting a new trial, shall direct the new trial to proceed before the same arbiter or arbiters, if able to try the cause; and the new trial shall, in that case, proceed before the same arbiter or arbiters accordingly.

No. XXXI.

SUGGESTION AS TO THE FURTHER USE OF THE ARBITER'S POWER OF IMPOSING PENALTIES IN A SUBMISSION.—(See *supra*, p. 235.)

One of the difficulties practically attendant on arbitration procedure is the want of some moderate power in the hands of the arbiter, to compel despatch in carrying on the details of the business of the submission. Where parties are inattentive to his orders, either in regard to the lodging of a paper, or leading a proof, etc., it is natural, and indeed proper, that an arbiter should feel reluctant to put into operation the severe sanction of absolutely refusing to receive the paper, or to fix a new diet for proof, until he has first allowed so much delay to take place, as shall render him fully assured that he is warranted in taking that decided course. And as one of the parties may probably, at some stage of the submission, be desirous to protract procedure, it seems desirable—if the object be practically attainable—that the arbiter should be armed with some effective compulsitor,

of a more moderate kind than that which has just been adverted to. But very considerable difficulty appears to attach to the subject. It is with reference to this matter that the suggestion is thrown out for consideration, whether it might not be advisable that parties should consent, in the submission, that the arbiter should be authorised to impose a moderate penalty, not exceeding some small maximum specified, upon any party failing duly to lodge a paper, produce an account, etc., or, in general, to perform any act which was *in facto proprio*, and which the arbiter had enjoined him to perform, in carrying forward the business of the submission.

Such a remedy, if otherwise practically serviceable, would be completely homogeneous with arbitration procedure, seeing that it flowed entirely from the consent of the parties-submitters, and would be regulated according to their views. It would be necessary, however, to provide for the suitable disposal of any penalty so levied. It could not, of course, be allowed to accrue to the arbiter, or to the clerk of the submission. Neither would it serve the purpose in view, if the penalty imposed on one party was made to accrue to the other, as this might lead to the neutralisation, eventually, of the penalties *hinc inde*, besides being otherwise objectionable. But if it were directed in the submission, that any penalties so levied should be forthwith paid out in some particular manner by the arbiter (in the form of a donation to an infirmary, for instance), and that receipts for the payment should be produced in the submission, perhaps such an arrangement might enable an arbiter effectually to apply a spur to a procrastinating party, and thereby to insure reasonable despatch in carrying forward the submission to a close.

Were it found possible to arm the arbiter with any such power as would admit of moderate and efficient exercise, it seems probable that the very existence of such a power might practically supersede all occasion for its exercise; which would, of course, be the most successful result which could be desired. It must, at the same time, be admitted that the subject is one of delicacy and difficulty, so that it is by no means without hesitation that the present suggestion is submitted for consideration.

No. XXXII.

EXAMPLE OF A SUBMISSION, GIVEN BY DALLAS, IN HIS SYSTEM OF STYLES, II. 499 (ED. 1774), WITH THE NOTES APPENDED THERETO.

Submission passed betwixt Sir G. M. of C., General to his Majesty's forces in Scotland, and R. G. younger of G.

This *blank*, on the other side hereof, subscribed by Sir G. M., designed *ut supra*, on the one part, and R. G., designed *ut supra*, on

the other part, is to be filled up, with the final sentence and decreet-arbitral to be given and pronounced by Sir John Cunninghame of Lamburghtoun, advocate, as judge-arbitrator, and amicable compositor, neutrally, and mutually elected, nominated, and chosen by both parties, and to the which judge-arbitrator, both the said parties have submitted, and by these presents, submit all clags, claims, debates, and controversies standing betwixt them; and specially that debate and controversy betwixt the said Sir G. M., as superior of the lands of C., with the pertinents, and the said R. G., as appriser thereof; anent the entry to the said lands of , craved by the said R. G. from the said superior; and anent the holding of the lands and change thereof, granted in favours of umquhile G. of E., by the deceased Sir L. F. of L., and R. M. of , with consent of his nearest of kin, conform to their claims and answers to be given in by them to the said arbitrator thereanent, with power to the said Sir J. C., as arbitrator foresaid, to decide, determine, and give forth and pronounce, his final sentence arbitral therein, betwixt the date hereof and the day of next to come; likeas, the said Sir J. C. has accepted, and by these presents accepts, in and upon him, the decision of the said matters particularly and generally above submitted, and faithfully promises to meet and treat thereupon, and pronounce, give forth, and deliver his final sentence and decreet-arbitral therein, betwixt and the said day. And however it shall please the said Sir J. C. to decide and determine in the premises, betwixt and the said day, both the said parties bind and oblige them, their heirs and successors, to stand, remain, and abide thereat, underlie, and fulfil the same, to one another, conform to the decreet-arbitral to follow hereupon, in all points; and that but any appellation, reclamation, obstacle, or again-calling whatsoever under the pain of Scots money, to be paid by the party failer to the party observer, or willing to observe the premisses, and by and *attour* the same, and together therewith; consenting these presents, with the decreet-arbitral to follow hereupon, be inserted and registered in the Books of Council and Session, or others competent, therein to remain for conservation, and if need beis allennarly, that letters, in form as effeirs, may pass hereupon; and to that effect, constitute

their Procurators, etc.—In witness whereof, etc.

Nota, 1. At times, submissions are general, submitting all clags, claims, questions, debates, controversies, actions, suits of law, debts, sums of money, and what else debateable and controvertible betwixt the parties, and which they may any ways ask, seek, or crave of one another, and have to lay to others' charges, upon whatsoever account, or for whatsoever cause, fact, deed, or occasion preceding the day and date hereof; conform to their respective claims, and answers to be given in by either party, against others, thereanent, to the arbiter.

2. At other times, submissions bear to submit, *ut supra*, which is general, as to that part; and then it bears these words: "and specially but prejudice of the generality foresaid," such a particular affair, and probably more than one; and, in that case, the submission is both general and special.

3. At other times, submissions only bear such a particular affair and no generality at all; and so but a special submission. But whether the one way or the other, is no matter; and the writer is to be determined in that, by the parties.

INDEX.

INDEX.

ACCEPTANCE OF OFFICE OF ARBITER; what obligations it implies towards parties, 201-203; *see* Appx. VII.; acceptance by judicial referee, 270.

ACCESSION TO SUBMISSION, 48, 49.

ACCOUNTANT; remit to, as man of skill, 225.

ACT OF REGULATIONS; 12, 31, 34; evil which 25th Article was designed to remedy, 31; Act applies to subscribed submissions only, 34; allows reduction of award for corruption, bribery, or falsehood, of arbiters, 34; has statutory force, 34; excludes challenge for arbiter's error in judgment, 36; does it exclude every challenge except those specified in the Act itself? 35; construction of the Act, 35, 37; reduction of awards, on grounds not within the Act, 35; Opinions as to scope of the Act, 37-42; words of Act, originally used in ordinary sense, 43; object and effect of the Act, 44; will it fortify a foreign award? 395.

ACTINGS OF PARTIES-SUBMITTERS; their effect in homologating arbitration-procedure, 319 *seq.*; their effect in putting a special construction on the contract of submission, 326, 327; their effect in homologating defects under a purely statutory submission, 327; or under a submission which is only in part statutory, 327. *See* Homologation.

ACTION; when submitted, its conclusions afford measure of claims of pursuer, 70; *see* Appx. V.; action, statutory term for bringing,—how far its currency is stopped by a submission, 309; action upon award, 357; what defences may be stated, *ope exceptionis*, 361.

ACTS OF PROCEDURE in submission; written by clerk, 290; *see* Clerk to Submission.

Actum et Tractatum of parties; effect of, upon submission, 50, 58; explains ambiguity, 59; may even enlarge contract, 59.

ADJUDICATION, Decree of; when already preferred, *pari passu*, by an award,—how far affected by subsequent reduction-improbation, 332.

ADJUDICATIVE CLAUSE in award; *see* Award.

ADVOCATE; his implied power to submit a pending process, 119; or to agree to a judicial reference, 269; may be selected as arbiter, 136; may continue to act, though raised to the Bench, 137; but may renounce office, 137; where party-submitter desires aid of counsel, arbiter should seldom refuse, 165; party not entitled to insist that arbiter shall delay procedure till he consult counsel, 170; does counsel's opinion, upon a joint-memorial and agreement, require an award stamp? 368, 369.

AGENCY; undue, in submission, may expose an award to reduction, 28.

AGENT (LAW); has no implied power to submit a pending process, 120; or to agree to a judicial reference, 269; may be selected as arbiter, 136; where party wishes to appear by,—should generally be allowed by arbiter, 165; expenses decerned in name of, 231; case where award was written by agent of a party, 244. *See* Attorney Licence.

AGREEMENT TO SUBMIT DISPUTES; must name arbiters, 85; otherwise ineffectual, 85; grounds of this rule not satisfactory, 85; not enough that arbiters be designed as holders of certain offices, 86; nor that the holder of a certain office be empowered to name arbiters, 86; agreement may include future disputes, 87; where *ancillary* to primary contract, and requisite for liquidating obligation, etc., therein, valid, though arbiters not named, 87; ancillary to sale, 87; ancillary to lease, 88; ancillary to mineral lease, 89, 91 and notes; ancillary ageement may remain in force, though award reduced, 92; or though arbiters, first named, may not agree in award, 92; or though

AGREEMENT TO SUBMIT DISPUTES.
one of parties dies, 93; has co-endurance with primary contract, 93, 265; what if it provides for naming two arbiters, and does not provide for naming oversman, 93, 94; can Court give remedy? 94, 95 and note; effect of agreement to submit, upon the currency of *prescription* of the claim, 307; or of a statutory term for bringing an action, 309. *See* Ancillary Submission; Coal Lease.

AGREEMENT STAMP; when applicable to a submission, 364.

AMBIGUITY IN AWARD, effect of, 249; competent means of explaining award, 250, 342, 344; *see* Award.

ANCILLARY SUBMISSION, 46, 87; how submission-clause called into operation, 46; powers of arbiter under it, 47; its function properly executorial, 75; construction of the clause, 75 *seq.*; can arbiter dispose of claims of damages? 77; or certain emerging legal questions? 76; can party choose his own arbiter at pleasure? 129, 130. *See* Agreement to Submit; Submission; Coal Lease.

ANOMALOUS SUBMISSIONS, 123 note [1], 124 note [1].

APPRAISEMENT STAMP; is it ever admitted in Scotland in place of an award stamp? 369, 370.

ARBITER; his error in judgment not fatal to award, 22, 336; judicial duties of, 23 note; his decision as to limits of submission, open to review, 57; in a general submission, should cause its limits to be well defined by claims, etc., 61, 62, 173; only bound to decide such claims, under general submission, as parties bring duly before him, 62.

Arbiters require to be named in agreement to submit disputes, 85; not enough that they be designed as the holders of certain offices, 86; nor that they are to be named by the holder of a certain office, 86.

Who may be arbiters, 127; arbiter, a private judge, 127; parties may select almost any person as arbiter, 127; disqualifications, by old law, 127 note.

Arbiter should stand indifferent, 130; what biassing interest disqualifies, 130, 131, 133; *see* Interest; how far disqualified by relationship to a party, 134; must not mix up himself, or his own accounts, with matters in dispute, 135, 136; his position at least as delicate as that of a public judge, 136 note [1]; if disqualified, cannot concur in selecting oversman, 138; limit of arbiter's power in selecting oversman, 138.

ARBITER.
Implied powers of arbiter, 47, 139; his powers correlative with his duties, 139. *See* Proof; Hearing; Procedure; Valuation; Prorogation; Devolution; Oversman.

Arbiters' tossing for choice of oversman invalid, 188; if oversman declines to accept, arbiter's power of nomination apparently not exhausted, 188.

Arbiter *functus* by devolution, 189, 200 note; arbiters' duty to form arbitral opinions before they *devolve*, 190; if, thereafter, they disagree, they should then devolve, 190; arbiters and oversman may arrange to sit together at proof or hearing, 191; after devolution, arbiters cannot sign award, even on matters not devolved on oversman, 200.

Arbiters cannot renounce their office at pleasure, 201; formerly liable to summary diligence, to compel them to fulfil their office, 202; still liable to an action, 203; at instance of either party, 207, 208; what cause justifies renunciation of office, 204, 206; to what compulsitors recusant arbiter may be subjected, 207 *seq.*

Arbiter may alter his award, if not delivered, or put on record, 210, 213; but cannot do so, after expiry of submission, 210, 212; arbiter's duty to alter his award, while revocable, if his opinion has changed, 213; power of one of several co-arbiters to revoke his own concurrence, in undelivered award, 213.

Arbiter's duty to exhaust submission, 214 *seq.*

Arbiter's power to remit to men of skill, 224 *seq.*, 387; express power should be given where it is foreseen that the aid of men of skill will be required, 225; limits of arbiter's power of remitting to men of skill, 226; and of remunerating them, 226, 227; does arbiter incur personal liability to remunerate men of skill? 227, 228.

Arbiter has power to award expenses of process, unless expressly otherwise provided, 228; what power over penalty in submission, 233.

Arbiter's remuneration not legally exigible, 312; unless stipulated before commencement of submission, 313; arbiter held corrupt if he exacts obligation for fee, pending submission, 314.

Arbiter's notes, how far available in reducing or defending award, 66, 67; how far allowed to explain award, 250 note [2], 259, 343; or to prove the *res gesta* under a submission, 343 *seq.*, 347.

ARBITER.

Can arbiter have deeds executed at his sight after close of submission? 255; arbiter may recall appointment of clerk at pleasure, 293; *see* Clerk to Submission; effect of arbiter's bankruptcy, 301.

Bribery of arbiter a ground of reduction of award, 328 *seq.*

Arbiter's interlocutory orders, how far reducible pending the submission, 336; when arbiter should be called as defender, in reduction of his award, 337.

How far oath of arbiter is admissible, in reducing or defending award, 337 *seq.*

How far arbiters' difference of opinion is probable by parol, 339.

Effect of non-concurrence among arbiters, 371; arbiter's orders, how enforced, *see* Appx. XIV., XVII. *See* Award; Remuneration; Submission.

ARBITER'S NOTES; *see* Notes of Arbiter.

ARBITRAGES, DES, 7.

ARBITRATION; antiquity of, 1; frequent resort to, 2; causes why arbitration procedure eligible, 2; selection of judge fitted for the particular case, 2; extrication of working contracts, 2; investigation unfit for public courts, 3; supposed despatch and economy of arbitration procedure, 3; arbitration among the Greeks, 4; the Romans, 5; modern commercial nations, 6; France, 7; England, 8; Scotland, 11; beneficial effect of Act of Regulations 1695, 14; arbitration procedure perhaps susceptible of some legislative aid, 15, 379; alleged impolicy of ousting jurisdiction of courts of law by arbitration, 32 note; finality of award essential to arbitration, 33; arbitration auxiliary to dispensation of justice, 33. *See* Submission; Arbiter; Award; Statutory Arbitration.

ARRESTMENTS ON THE DEPENDENCE; subsist notwithstanding judicial reference of process, 283; *see* Cautioner.

ARTICLES OF REGULATION 1695; *see* Act of Regulations.

ARTICLES OF ROUP; submission clause in, how construed, 72, and notes on 72, 73; implies power in arbiter to lead necessary proof, 150.

ASSIGNATION of party-submitter's whole claim and interest; *see* Assignee.

ASSIGNEE of party-submitter; how far entitled to appear in submission and crave decree, 116; assignation does not liberate cedent, as party-submitter, 117.

ATHENIAN LAW regarding arbitration, 4.

ATTORNEY LICENCE; can agent in judicial reference claim his expenses if he has no licence? 286.

AUDITOR OF COURT; taxes fee of judicial referee and clerk, 230.

AUTHENTICATION OF FOREIGN AWARD; what is required for this in Scottish Court, 393 *seq.*

AWARD; affords plea of *res judicata*, 21; finality of, important in arbitration, 33; grounds of reduction of, by Act of Regulations, 34; colourable award not valid, 35, 245; may render arbiter's notes a part of itself, by referring to them, 66.

Award against a wife, 98, 100; against tutor, 109, 360.

Award can go no farther than parties, if agreeing, could jointly do by their own deed, 97, 121, 125; *ex. gr.*, can dispose of claims of debt, 121; but if claim rests on document said to be forged, cannot dispose of crime of forgery, as regards public interest, 117; nor of other matters affecting public interest; examples, 121-123.

Award reduced, where an arbiter mixed up his own accounts with those under submission, 135.

Draft of award should generally be shown to parties, 171, 256; but arbiter not bound to do so, 171.

Award signed by arbiters after they were *functi*, by devolution, invalid, 184.

Importance of narrative of difference of opinion between arbiters, in oversman's award, 193, 245; or in award by oversman and one arbiter, 193 *seq.*; must there be writing, signed by both arbiters, narrating their difference, before oversman can act? 192 *seq.*; what evidence of difference requisite to support award by majority of three co-arbiters, 195 note [3].

Part-awards good, if conformable to arbiters' powers, though arbiters subsequently err, 200, 266 note [1];

Award, while neither delivered, nor put on record, may be cancelled by arbiter, 210; when is delivery of award held complete? 211 *seq.*, 259, 260; recording of award, equivalent to delivery, 213; award executed and left in hands of clerk, at close of submission, is presumed delivered, 212, 213; award should be altered by arbiter, so long as revocable, if his opinion has changed, 213.

Effect of penalty in award, 234.

Award is arbiter's sentence, 239; how construed, 239; cannot be signed after submission expires, 239, 240.

AWARD.

Requisites of award, 240; effect of homologation, 240; chief *clauses* of award, 241, 242; what if appeal to "God and a good conscience" be omitted, 242; award not necessarily written by clerk to submission, 243, 244.

What if award executed on Sunday, 244.

Award in favour of assignee of a party, 245; award must embody arbiter's own judgment, 245; award binding only so far as conform to agreement of parties, 247; should decide finally and exhaustively, 247, 248; and conclusively, 253; excess in award fatal in whole or in part, 233, 248; ambiguity in award, 249; ex-arbiters not allowed to explain, 250, 342; what extrinsic aids for explaining award, 252; award should be congruous, 252; reservations hazardous, 253; or conditional findings, 253; no arbitral power should be reserved after submission closed, 253; can final award direct deeds to be executed at sight of arbiter? 255.

Rectification of error in award, 256, 257.

Award should be self-contained, 258; avoid unnecessary *rationes decidendi*, etc., 259; award binding against heirs, 262; effect of award ordaining a discharge, 262.

Suggested distinction between interim-award and part-award or partial award, 262; requisites of both of these awards, 263; interim-award, how far revocable by arbiter, 263; delicate discretionary jurisdiction, 264; should final award refer to previous interim-award? 264; what if interim-award be not specially designed as such, 265.

Any award is beyond arbiter's recall after expiry of submission, 265; what if interim-award be inherently pendent, on the pronouncing of a subsequent and final award, 266.

Award against party who has been sequestrated, pending a submission, 300.

Grounds of challenge of an award, 327 *seq.*; on Act of Regulations, 328 *seq.*; at common law, 332 *seq.*; grounds and warrants of award, how far necessary to be produced in defending reduction, 337; proof admissible in reducing or defending award, 338 *seq.*; if oversman's award falsely alleges that the arbiters had differed, the falsehood is probable by parol, 341; if an award be improbative, when

AWARD.

delivered, the defect cannot be supplied by parol, 342; how far it may be affected by arbiters' notes, 343 *seq.*; or be construed by pleadings of parties, 346, 347.

Action and diligence upon award, 357; consent to registration, 357 *seq.*

In award by majority of arbiters, what proof is required of dissent by minority, 371, 372.

Statutory award, to be executed in writing, 377; on what grounds reducible, 377; Foreign award, 394; how far valid in Scotland, 394 *seq.*; how far affected by the Articles of Regulation, 395; what authentication of such an award is requisite in Scotland, 398 *seq.* *See* Arbiter; Submission; Stamp; Appx. XXVI.

Award, or Report to Court, by judicial referee, 276; *see* Judicial Reference.

BACON, LORD, his "Wisdom of the Ancients," 1.

BALDASSERONI, ASCANIO, "Delle Assicurazioni Marittime Tratto," 6.

BANKRUPT ACT; as to submissions, 114, note [2]; exempts certain arbitration procedure from stamp-duty, 370.

BANKRUPTCY of party-submitter; does not cause fall of submission, 114; notice to trustee, 114; how it affects submission and award, 300, 301; bankruptcy of arbiter, 301.

BANKRUPT ESTATE; submissions respecting, 114. *See* Bankrupt Act; Bankruptcy.

BIASSING INTEREST; disqualifies arbiter; *see* Interest; Arbiter.

BILLS; mutually deposited with arbiter, in making a submission to him, 50.

BOND AND RELEASE; deposited with arbiter in making submission to him, 49.

BOND OF SUBMISSION, 49.

BONDMEN; of old disqualified as arbiters, 127 note; now unknown in Scotland, 128 note.

BORROWING PAPERS in submission, 291; *see* Clerk to submission.

BOUCHER, P. B.; his French translation of Il Consolato del Mare, 2, 4.

BRIBERY OF ARBITER; ground of reduction of award, under Act of Regulations, 34, 328 *seq.*; gift, etc., to arbiter, when is it bribery? 328; gratuitous assignation of debts to arbiter, 329; agreement to give fee to arbiter, made pending submission, 329. *See* Remuneration of Arbiter.

BURGH; party to a submission, 115.

CANCELLING of undelivered award; arbiter's power therein, 210 *seq.* *See* Arbiter; Award.
CASES, LIST OF, xiii.
CAUSE CELÈBRE, in arbitration, 1.
CAUTION; case where charger upon award held bound, in a suspension, to find caution, before bill of suspension refused, 362.
CAUTIONER (for party-submitter); does submission fall by death of? 109 note, 299; is contract of submission completed before he signs? 295, 296.
CAUTIONER IN SUSPENSION; how affected by judicial reference of process, 284.
CAUTIONER IN LOOSING OF ARRESTMENTS, ON DEPENDENCE; how affected by judicial reference of process, 284.
CEDENT (party-submitter) not freed of liability by assigning claim, 117.
CHALLENGE OF AWARD, 327 *seq.* *See* Award.
CHARLES I., submissions to, 11.
CITATION of witness or haver, before arbiter, how effected, 353; what if witness lives in England, 356; *see* Appx. XII. *seq.*
CLAIMS, by parties; useful for defining limits of general submission, 61, 62; and also of mixed submission, 69; form of claim, 173; revisal of, 173; sometimes no claim requisite, 174; what subjects may competently be included in claims, 120 *seq.*; how far necessary that claims be produced in reduction of award, 337. *See* Procedure in Submission.
CLAUSE OF SUBMISSION; ancillary to primary contract; *see* Submission.
CLAUSES OF AWARD; *see* Award.
CLERICAL ERROR in award; may be rectified, 256.
CLERK OF SUBMISSION; is servant of arbiters, 210; when is delivery of award to clerk held complete delivery? 211 *seq.*, 260; executed award, left in hands of clerk, at close of submission, —presumed to be delivered, 212; not indispensable that award be written by clerk, 243, 244; how clerk appointed, 289; not always appointed, 289; requisites of clerk, 290; duties of clerk, 290 *seq.*; as to conduct of submission procedure, etc., 290; clerk subject to orders of arbiters, 292; removeable at pleasure, 293; remuneration legally due to clerk, 292 *seq.*; can he claim payment from arbiter? 293; what if arbiter award him excessive remuneration, 293; decree for account in name of clerk, 230; account suffers triennial prescription, 294; how far is clerk admissible as witness in reduction of award, 338 *seq.*; as to *res gesta* of submission, 338. *See* Appx. VIII.
CLERK OF JUDICIAL REFEREE; his fee taxed by auditor of Court, 230.
CLOSED RECORD; *see* Procedure; Appx. IX.
COAL LEASE; proof as to workable state of coal must be primarily taken by men of skill, as referees, when so agreed in lease, 89 *seq.*, 335 note; ancillary submission-clause in coal lease; *see* Agreement to submit.
CO-ARBITERS; what evidence of difference of opinion requisite, to enable majority to decide, 195 note; how far can legal compulsitors be used to make them proceed with a submission? 209; nature of duties undertaken by them, 209; Non-concurrence among Arbiters; Co-arbiter may recall his concurrence in undelivered award, 213; *see* Arbiter.
CODE DE PROCÉD. CIVILE, 7.
COLOURABLE SUBMISSION AND AWARD, invalid, 36, 37, 246.
COMMISSION FOR REGULATION OF JUDICATORIES, 12.
COMMISSION; can arbiter take proof by, without express power? 160 *seq.*; *see* Appx. II. 2; XVI.
COMMISSIONER OF COURT; formerly held not entitled to fee on taking proof, 317; *see* Proof.
COMMON LAW PROCEDURE ACT (Eng.), 9.
COMPANIES CLAUSES (SCOTLAND) ACT; *see* Statutory Arbitration, 374, 378 *seq.*; *see* Appx. XXVII.
COMPANY, MERCANTILE; may enter into submission regarding moveable or heritable estate, 113; single partner cannot bind company to a submission, 113; incurs personal responsibility if company repudiate, 114; how assent of company proved, 114.
COMPENSATION, 60 note.
COMPENSATION FOR LAND-SEVERANCE; how far it extends, 387.
COMPROMISE WEARING DRESS OF AWARD; is reducible, 246, and note [2].
CONDITIONS IMPLIED, qualify arbiter's undertaking towards the parties, 22 *seq.*; qualify also obligations of parties-submitters towards each other, 27 *seq.*; breach of these frees from obligation to implement award, 28.
CONDITIONS qualifying obligation to implement award; effect of them, 38, 42.
CONSIGNEE OF GOODS; special case, where submission by him as to marketable state of goods sustained, 113.
CONSOLATO (IL) DEL MARE, 2, 4.
CONSTITUTION OF CONTRACT OF SUBMISSION, 44; *see* Submission.

CONSTRUCTION OF SUBMISSION, 57; *see* Submission.

CONTRACT, PRIMARY; ancillary submission-clause in, *see* Submission; Agreement to submit.

CONTRACT OF PARTNERSHIP, submission-clause in, 70; scope of the clause, 71.

CONTRACT OF SUBMISSION; *see* Submission.

CORPORATION; may enter into a submission, 120; *see* Burgh.

CORRUPTION OF ARBITER; ground of reduction of award, by Act of Regulations, 34, 35; inferred by exacting obligation for fee pending submission, 310; allegation of presumed corruption, 145, note [1]; constructive sense of term "corruption," 37; Opinions and cases thereanent, 37 *seq.*; includes any plain failure in arbiter's duty (involving injustice), distinct from mere error of judgment, 39, 40; does not necessarily involve moral corruption, or moral wrong, etc., 40; may be shown in refusing proof, or hearing, 41, 152, 168; or by want of due desire to do justice, 41; what constitutes "corruption," 41 *seq.*; *see* Act of Regulations.

COUNCILS, EQUITABLE, of conciliation or arbitration; Bill for, 11.

COURSING MEETING; submission-clause in rules of, 73 note.

COURT OF SESSION; arbitration procedure in, 14; *see* Appx. XXX.

COURTS OF LAW; usurping power to review awards on merits, 33; some Courts unfriendly to arbitration, 33; alleged impolicy of ousting their jurisdiction by arbitration, 32 note; what remedial powers in Court, where ancillary submission proves inoperative, 92, 93, 94, 335 note; how authority of Court interponed to judicial reference, 271; how recalled, 271, 272; *see* Judicial Reference; Appx. XVIII. XIX.

CRIME; cannot be made subject of submission, so as to affect public interest, 121.

Crimen falsi; see Falsehood.

CROSS-EXAMINATION of witnesses; arbiter's control over, 155; *see* Witness; Proof.

CURATOR; enabled to become party to statutory arbitration, 374.

Curator bonis OF LUNATIC; may submit question as to moveable estate, 113.

DALLAS; style of submission, by; Appx. XXXII.

DAMAGES; claim of; under submission-clause in contract of partnership, 70, 71 note; claimed under submission-clause, after close of primary contract, 75, 76 note [2]; claimed during currency of primary contract, 78 *seq.*, 79 *seq.* notes; how far competent to recover damages under ancillary submission, 82, and note [3]; can arbiter be subjected to damages for wilful breach of his obligations towards parties? 209; award of prospective or contingent damages, 387; damages for wrong done by Railway Company in disobeying statute, 392; how far claimable under statutory arbitration, 392; how far claimable by yearly tenant, under statutory arbitration, 392; *see* Statutory Arbitration.

DEAF AND DUMB, "allutterlie;" can they be arbiters? 127 note, 128.

DEATH OF PARTY; causes fall of submission, if not specially otherwise agreed, 299; does not cause fall of judicial reference, 282; but process must be transferred, 283; what if submission be, in part, of statutory character, 384; or ancillary to a contract of sale, 387 *seq.*; death of arbiter, 300; of judicial referee, 283; of cautioner of party, 299; of party's husband, 299; of tutor, party-submitter, 106; of pupil, party-submitter, 106.

DEBT, due to arbiter by party, or *vice versa;* how far it disqualifies arbiter, 134; case where arbiter was debtor of one party and creditor of the other, 135.

DECREE-ARBITRAL, *see* Award.

DECREE OF ADJUDICATION; how far does reduction-improbation of decree affect award which has already preferred said decree? 332.

DEED STAMP; when applicable to a submission, 364; *see* Stamp.

DELEGATION of arbiter's office; not involved in merely consulting men of skill, 246.

DELIVERY OF AWARD; when held completed, 210 *seq.*, 259, 260; if award left in hands of clerk at close of submission, presumed to be delivered, 212; award, put on record, is delivered, 213; *see* Award.

DEMOSTHENES; quotes Athenian law regarding arbitration, 4.

DEPOSITION OF WITNESSES; taken down by clerk to submission, 290, 291, *see* Clerk to Submission; how far is deposition of deceased witness available in after-process between same parties? 351; *see* Proof; Appx. XVI.

DEVOLUTION on oversman; power of, 185; where two arbiters disagree in opinion, 185 *seq.*; cannot take place

DEVOLUTION.
till arbiters have disagreed, 189; if one arbiter die before disagreement, survivor cannot devolve, 189; devolution substitutes oversman in room of arbiters, 189; does not require to be probative writ, 190; needs no technical style, 190; tenor of minute of devolution, *see* Appx. XXIII.; effect of there being no minute of devolution, 191 *seq.*; importance of its narrating arbiters' difference of opinion, 196; devolution is not implied in nomination of oversman at outset of submission, 197; effect of such nomination at later stage of submission, 197; devolution distinct from prorogation, 198; it must include all matters not decided by arbiters, 199; otherwise, seems fatal error, 199, exception in peculiar species of submission, 199, note [1]; devolution defective, may be cured by homologation, 324; no stamp required for minute of devolution, 366. *See* Appx. III. Note; XXII. XXIII.

DIFFERENCE OF OPINION between arbiters, how far probable by parol, 245, 339.

DILIGENCE FOR CITING witnesses and havers in judicial reference, 276; *see* Judicial Reference.

DILIGENCE, summary; could formerly be used to compel arbiter to fulfil his office, 203; not competent against pupil reaching puberty, when raised upon award against tutor, 109.

DILIGENCE UPON AWARD, 357 *seq.*; how far competent against married woman, 98 *seq.*; consent to registration, 98 *seq.*; *induciæ*, 358; diligence directed against one not originally party to contract of submission, 359; must extract of submission, and any prorogation or devolution, be produced in Bill Chamber, as well as award? 361; cases where charger required to find caution, before bill of suspension refused, 362.

DISCHARGE, effect of award ordaining, 262.

DISPUTES, future or contingent, may be effectually submitted, 87.

DISQUALIFICATION OF ARBITER, 130, 131.

DRAFT OF AWARD, expediency of arbiters submitting to parties, 256.

DUMB, *see* Deaf.

DURATION OF ANCILLARY SUBMISSION; not naturally beyond term of primary contract, 75; unless as to provisions which come into force at end of contract, 75, 76 note [2].

DURATION OF SUBMISSION, 294; where submission was in part of statutory character, 384; *see* Submission.

DUTIES OF ARBITER correlative to his powers, 139; nature of duties, 139; function, judicial, 139, 140; what are means necessary to performance of judicial duty, 140; arbiter's failure in duty may amount to constructive "corruption," 37, 41; its effect, independently of constructive "corruption," 38 *seq.* *See* Arbiter.

DUTY, PROGRESSIVE, *see* Stamp.

EMERIGON, Traité des Assurances, 7.

ENGLAND, arbitration procedure in, 8.

ENTAIL, HEIR OF, what power to submit, 115, 123, 387; enabled to become party to statutory arbitration, 374.

EQUITABLE COUNCIL OF CONCILIATION, or arbitration, Bill for, 11.

ERECTION, LORDS OF, and others, their submissions to Charles I., 11.

Error calculi; may be rectified in award, 256; limits of proper *error calculi*, 257.

ERROR, CLERICAL, in award, may be rectified, 256.

ERROR IN LAW, 34, 256, 257.

EVIDENCE, *see* Proof.

EXCEPTION, personal; bars party from objection not timefully stated, 133; its effect against party dilatory in leading proof, 155; against plea of no hearing, 170; does it bar party from pleading prescription of a claim on lapse of the submission? 309 *seq.*; or on lapse of statutory term for bringing action? 309 *seq.*; or from founding on alleged irregularity in leading proof? 321, 331, 333, 334; or on defect in award? 338; *see* Homologation.

EXCESS IN AWARD, fatal to award, in whole or in part, 233, 248; *see* Award.

EXECUTORS; can they effectually submit, beyond any patrimonial interest of their own in the succession? 112; action of relief by heir, founding on award to which executor no party, 351; circumstances in which objection that party-submitter not duly vested with that office, overruled, 336.

Ex Parte PROOF; its effect upon validity of award, 155 *seq.*

EXPENSES; implied power of arbiter to deal with, 228 *seq.*; power of judicial referee to deal with, 228, 230; what if party be sisted only as trustee, 229; effect of limits imposed by submission on expenses, 229; expense of recording award, 230; fee of judicial referee and clerk, 230; expenses decerned for, in name of agent and clerk respectively, 230; award itself should fix what expenses are allowed, 231; what if "two-thirds" allowed, and no total sum specified, 231; effect of partial re-

EXPENSES.
duction of award upon decerniture for expenses, 232; how far can a party without attorney licence claim expenses of judicial reference? 286, 287. *See* Arbiter; Appx. II., 9.
EXPERIMENT, chemical, by arbiter; case where one party present and not the other, 158.
EXPIRED SUBMISSION; how far is proof therein available in after-process, 348 *seq.*
EXPLANATION OF DELIVERED AWARD; cannot be accepted from ex-arbiters, 249, 250; what extrinsic aids allowed to clear up import of award, 251.

FACTOR, JUDICIAL, not authorised to enter into submissions, under usual powers, 111; enabled to become party to statutory arbitration, 374.
FACTOR *loco tutoris*, may submit questions as to moveable estate, 111; but minor's challenge, on minority and lesion, may afterwards be brought, 111.
FALSEHOOD, committed by arbiter, is a ground of reduction of award, 34, 35, 330 *seq.*; what constitutes "falsehood," 330; must it involve forgery? 330; allegation that arbiters had falsely stated they had duly considered the case, 331; that they had falsely set forth that witnesses were sworn, 331; or that claims had been lodged, and one of parties examined, 331; allegation of constructive falsehood, 332.
FEE OF ARBITER; *see* Remuneration of Arbiter.
FEE OF CLERK to Submission; *see* Clerk to Submission.
FEE OF JUDICIAL REFEREE, how decerned for, 230; taxed by auditor, 230; *see* Judicial Reference.
FEMALE PARTY SUBMITTER, does her marriage cause fall of submission? 100, 101; award open to reduction if no notice given to husband to appear, 107 note.
FOREIGN AWARD, 394 *seq.*; authentication of, 244; essentially the constitution of a personal contract, 394, 400; *see* Award.
FOREIGN PROOF; how witnesses or havers in England are examined under submission, 356; *see* Proof.
FORGERY, question of, cannot be competently submitted, so far as regards public interest, 121; *see* Falsehood.
FRAUD OF PARTY-SUBMITTER, frees opposite party from award, 27.
FRIENDLY SOCIETY, arbitration procedure by, 393; what if all the referees be members of the society, 393.
FURIOUS PERSONS, can they be arbiters? 127 note, 128.
FUTURE DIFFERENCES, may competently be submitted to arbitration, 125.

GENERAL SUBMISSION; *see* Submission.
GENERAL SPECIAL SUBMISSION; *see* Submission.
GIFT TO ARBITER, when is it bribery? 328.
GRATUITOUS ASSIGNATION OF DEBTS in favour of arbiter, is it bribery? 329.
GROUNDS AND WARRANTS OF AWARD, how far necessary to be produced in reduction of award, 337.

HAVERS; deposition of, taken down by clerk to submission, 290; how havers are cited before arbiter, 353 *seq.*; how haver is compelled to produce writing, 354, 355; what if he resides in England, 356. *See* Clerk to Submission; Proof; Appx. XII. *seq.*
HEARING OF PARTIES; arbiter's duty therein, 39, 40, 41; one great means of enabling arbiter to perform his office, 140, 163; *implied power* of arbiter as to hearing, 140, 141; power in dealing with hearing, analogous to power in dealing with proof, 163; fit time for hearing on whole cause, 164; *viva voce* or written pleadings, 164; hearing parties themselves or their counsel, etc., 164; arbiter's *large discretion*, especially after allowing one hearing, 164; as to allowing or refusing counsel or agents, 164, 165; when may arbiter dispense altogether with hearing, 165; sometimes, after inspecting premises, etc., as man of skill, 165, 166, 167; no general rule as to cases of valuation, 166 note; arbiter seldom safe in refusing or even omitting all hearing, 168; when is want of hearing necessarily fatal? 168, 169, 170; if arbiter allows hearing to one party, must equally allow it to the other, 170; but party may waive or forfeit his right to be heard, 171; generally advisable to allow a hearing on arbiter's draft of award or notes of opinion, 171; sometimes one oral hearing may suffice, without any written claims or record, 173, 174. *See* Procedure in Submission; Appx. X.
HEIR-AT-LAW; action of relief against executor, founding on award to which executor not a party, 351, 352.
HEIR OF ENTAIL; what power to submit, 115, 123, 387; enabled to become party to statutory arbitration, 375.
HERITAGE; verbal submission as to, followed by *rei interventus*, 55, 56.
HOLDING PARTY CONFESSED, 155.
HOLOGRAPH MISSIVES, make valid submission, 48.

HOMOLOGATION; its effect in validating informal submission, 45; cures defective prorogation, 180; not effectual if done in ignorance, 180; its effect upon award. 240; upon judicial reference, 273, 274; upon arbitration procedure, 319; homologation cannot be founded on acts done in ignorance, or under restraint, 319, 322; effect of pleading before arbiters in curing defect in prorogation of submission, 322 *seq.*, 325; or want of signature to submission, 326; some acts also put special construction on contract of submission, 326; effect of homologation under purely statutory submission, 327; its effect under mixed submission, 327, 383, 384; its effect upon award under statutory submission, 384; how far oaths of arbiters and clerk admissible to prove acts of homologation, 338; *see* Exception, Personal.

HONESTY AND IMPARTIALITY; impliedly undertaken towards the parties by arbiter, 23.

HORNING, LETTERS OF; formerly granted against arbiter to compel him to perform his office, 203.

HUSBAND; how far can he be party-submitter respecting wife's heritage? 98; will death of female party-submitter's husband, having interest in submission, cause fall of submission? 299.

IMMORAL OBLIGATION, cannot competently be submitted to arbitration, 123.

IMPARTIALITY, an implied condition in the arbiter's undertaking towards parties, 23, 38; involves equal-handed procedure to both parties alike, 23, 24, 38, 39; if arbiter hears one party, he must also hear the other, etc., 24, 152 *seq.*; case of Sharpe, 24; effect of violation of impartiality by arbiter, 26; violation of any condition under which arbiter holds his office is an act *ultra vires*, 26.

IMPLIED POWERS OF ARBITER, 47, 139.

INHIBITION ON DEPENDENCE; subsists notwithstanding judicial reference of process, 283; *see* Judicial Reference.

INIQUITY, no ground for reducing an award, 32, 336.

INSPECTION OF PREMISES, etc., by arbiter; should be made in presence of both parties, 156 *seq.*; effect of wrongful failure to make inspection, 157; inspection may sometimes supersede further proof, 148.

Instrumenta noviter reperta; effect of this plea in reduction of award, 333.

INTEREST, PARTIAL, disqualifies arbiter, 130, 131, 132, 133; but objection should be timefully taken, 133; difficult to define what interest will not disqualify, 133; what if arbiter, *qua* trustee, be creditor of one of parties, 133; what if he be personally creditor, or debtor, of one of parties, 134; what if he mixes up his own accounts with the accounts under submission, 135; or mixes himself up with matters in dispute, 136; party may be arbiter in his own cause, if other party agrees, 137.

INTERIM AWARD, 262; how diligence is raised on it, 357; *see* Award.

INTERIM DECREE-ARBITRAL; *see* Interim Award.

INTERLOCUTORS OF ARBITER; written by clerk to submission, 290; *see* Clerk.

INTERLOCUTORY ORDERS of arbiter; how far a fit subject for reduction, 336.

INTRODUCTORY CLAUSE of award, 241; *see* Award.

INVENTORY OF PRODUCTIONS in submission, 291; *see* Clerk.

IRRELEVANT PROOF, may be rejected by arbiter, 154; *see* Proof.

ISSUE, for trying case of arbiter's alleged non-hearing of parties, 170; *see* Hearing.

JOINT-MISSIVE OF SUBMISSION, 48; *see* Missive.

JUDGE, PRIVATE; arbiter is, 139.

JUDGE, SUPREME; may accept of submission, 137; frequently done in former times, 137; rarely now, 137.

JUDICATORIES; Commission for the regulation of, 12.

JUDICIAL FACTOR; *see* Factor, Judicial.

JUDICIAL NATURE OF ARBITER'S FUNCTIONS, 139: requires impartiality as to proof, 152; hearing, etc., 170; *see* Arbiter.

JUDICIAL REFEREE, his power over expenses, 228; his fee, 230; what relief competent to party paying fee, 316; *see* Judicial Reference.

JUDICIAL REFERENCE; may be adopted at any stage of a process, 267; similarity to ordinary submission, 267; *how entered into*, 269; Appx. XVIII. XIX.; requisites of minute of reference, 269; advocate has implied power to refer judicially, 269; but not law-agent, 269; *expenses* of process and reference, 270; interponing authority of Court, 270; not afterwards revocable at pleasure of one of parties, 271; nor by Court, at least without sufficient cause, 271, 272; remit to men of skill sometimes, in substance, a judicial reference, 273; what if in-

JUDICIAL REFERENCE.
terlocutor, interponing authority of Court, be omitted, 273; procedure in the reference, 273, 274; *powers and duties* of referee, 274, 275; effects of limits imposed in minute of reference, 275; referee's award or report to Court, 276, 277; *interponing authority of Court*, 277, 280; what objections may be stated, 277; what defects may be rectified, 278; new remit to referee, 278, 279; judicial reference cannot go beyond the process referred, 279; but ordinary submission may embrace a process, 279, 280; *remuneration* of referee, 281; reference does *not fall by death* of party, 282; nor is it prorogated by referee, 282; if process falls asleep, must be wakened, 282; if party dies, must be transferred, 283; death of referee, 283; *diligence on the dependence* subsists, notwithstanding judicial reference, 283; what if the process be extra-judicially submitted, 283, 284; effect of judicial reference on cautioner in a suspension, 284; effect on cautioner in loosing of arrestments used on the dependence, 284, 285; expenses of agency in reference, how far claimable by agent without *attorney licence*, 282; effect of *homologation* in curing want of interlocutor interponing authority of Court, 320. [*See* Appx. XVIII. XIX.

JURISDICTION; grant of, involves certain implied powers in judge, 139; private quasi-jurisdiction of arbiter, involves certain implied powers from parties, 139; how is arbiter's defect of jurisdiction supplied in leading proof, 353 *seq.*; what if witness or haver reside in England, 356 *seq.*

JURISDICTION OF STATUTORY TRIBUNAL (Lands Clauses, etc. (Scotland), Acts); what class of questions competent to, 391.

JURY TRIAL, may be resorted to, if statutory arbitration proves abortive, 391; in what circumstances precluded, 391; unsuited for determining what falls under a submission, 391.

LANDS CLAUSES (SCOTLAND) ACT; *see* Statutory Arbitration; Appx. XXVIII.

LAWSUITS; may be submitted to arbitration, 125; if authority of Court interponed, reference is judicial; *see* Judicial Reference.

LEASE; ancillary submission clause in, 78 *seq.*; for valuation of stocking, etc., good though arbiters not named, 88; how far effectual against singular successor in the lands, 80, 81; implies power to arbiter to lead necessary proof, though not expressed, 150 *seq.*

LEGITIMACY, not a question which can be submitted, 123.

LESION AND MINORITY, may be pleaded by minor against award, 102; limits of the plea, 103 *seq.*; *see* Pupil; Minor.

LETTERS OF HORNING, formerly granted against an arbiter, 203; to what effect, 203.

Lex loci, sufficient to authenticate foreign award, constituting mere personal obligations, 394 *seq.*; what circumstances insufficient to displace the *lex loci*, 399.

LIFERENT RIGHTS OF LAND, specifically stated in submission, and followed by general clause, do not include disputes as to fee of land, 69.

LIFERENTER'S power to submit; *see* Statutory Arbitration.

LIMITATION of term for bringing action, how far it is interrupted by a submission, 309.

LIMITS OF SUBMISSION; should be well defined, 57; arbiter's decision thereon liable to review, 57, 58; of general submission, how determined, 59 *seq.*

LIQUIDATORS, their powers as to submissions, 114, 115.

Lis; alleged difference between submission of *lis* and *negotium*, 34 note.

LOCALITIES; proof of, may help to explain boundaries, as stated in award, 252.

Locus penitentiæ; in informal submission, how cut off, 45.

LOOSING OF ARRESTMENTS ON DEPENDENCE; how far is cautioner affected by judicial reference of process, 284, 285.

LOSING PARTY; technical definition of term, 229 note [2].

LUNATIC; *curator bonis* of, may submit question as to moveable estate, 113.

MAILS; remuneration for railway conveyance of, 393.

MAJORITY OF CO-ARBITERS; can they decide? 371 *seq.*; what proof is required of the dissent by the minority, 372; can majority carry on submission? 373.

MANDATE, GENERAL; does not authorise mandatary to enter into submissions, 119; under special power, the mandant will be bound, 119; unless mandatary has used words proper to bind himself, and not his constituent, 119; if constituent effectually repudiates submission, mandatary incurs personal responsibility, 119.

MANDATE; implied, of counsel, to submit a pending process, 120; *see* Agent.

MARCHES DISPUTED; parol submission respecting, 54, 55.

MARRIAGE, VALIDITY OF; not a question which can competently be submitted, 122; marriage of female party-submitter, does it cause fall of submission? 100 *seq.*; lays award open to reduction, if no notice of submission given to husband, 107 note.

MASTER AND WORKMAN ACT, 9; exempts arbitration procedure from stamp-duty, 370.

MEMORIAL (JOINT) TO COUNSEL, may be equivalent to submission, 48; *see* Stamp.

MEN OF SKILL; arbiter's consulting them, no delegation of his own functions, 246; arbiter's power of remitting to, 224 *seq.*, 387; acting as referees, may lead parol proof when necessary, 333; how far must they put witnesses on oath, 333, 334; are the primary tribunal, when so agreed in submission-clause of lease, 335 note; *see* Agreement to Submit; remit to men of skill sometimes, in substance, a judicial reference, 273. *See* Appendix II. 3.

MERITS OF DISPUTE; award not reviewable on, 38; *see* Award.

MINERAL LEASE; ancillary submission-clause in; *see* Agreement to Submit; Coal Lease; Ancillary Submission.

MINOR; may enter into submission, as to *moveable estate*, 109; if he has curators, his act null, without their consent, 110; imprudent to enter into submission with minor who has no curators, 110; minor cannot submit questions involving gratuitous alienation of *heritage*, 110; but may apparently submit questions as to his onerous deeds affecting heritage, 110; has right of challenge, on *minority and lesion*, 110; limits of this plea, 103 *seq.*; does not apply to questions as to trade, submitted by a trading minor, 110; effect of opposite party's knowledge of the minority, 111; minor may be *arbiter*, 128, 129; not so formerly, 127 note; what if a party, under ancillary submission-clause, should name a minor arbiter, 129; *see* Tutor; Pupil.

MINORITY AND LESION, limits of the plea of, 103 *seq.*; *see* Pupil; Minor.

MINORITY OF CO-ARBITERS; what proof required of their dissent, so that majority may decide, 372; can majority carry on submission by themselves, as well as decide? 372 *seq.*

MINUTE OF DEVOLUTION, 189; *see* Devolution.

MINUTE OF JUDICIAL REFERENCE, a step in depending process, 269; *see* Judicial Reference.

MINUTE OF PROROGATION, 178; *see* Prorogation.

MINUTES IN SUBMISSION, generally framed by clerk of submission, 290; see Clerk of Submission; minutes require no stamp, 367; how far available in proof of the *res gesta*, 346.

MISCONDUCT OF ARBITER; leading to injustice, amounts to constructive "corruption," 38, 39.

MISREPRESENTATION by party, to oversman, at inspection of subject, 157.

MISSIVES, MUTUAL; may constitute a submission, 48; if holograph, binding, 48; if not holograph, or tested, may be validated by homologation or *rei interventus*, 48; joint-missive of submission, 48.

MIXED (GENERAL-SPECIAL) SUBMISSION, 59, 68; *see* Submission.

MIXED SUBMISSION, partly statutory, partly common law, 384 *seq.*; care requisite to define how far statutory provisions are to apply, 384; converted into common law submission, 389.

NARRATIVE CLAUSE OF AWARD, 241; *see* Award.

Negotium; alleged difference between submission of *lis* and *negotium*, 34 note.

NOMINATION OF OVERSMAN; should be made by arbiters at outset of submission, 187; when made at outset, does not include a devolution, 189, 197; effect of nomination at later stage of submission, 197; nomination must not depend on event of a toss, 188; if oversman declines to accept, arbiters' power of nomination apparently not exhausted, 188; oversman's willingness to accept should be ascertained before nomination, 188; what if nomination not executed till after oversman has inspected subjects in dispute, 198; nomination of oversman by two arbiters out of four invalid, 198. *See* Appendix III. Note; XXII.

NON-CONCURRENCE AMONG ARBITERS, effect of it, 371; can majority decide? 371 *seq.*; what proof is requisite of dissent by minority, 372; can majority carry on submission, as well as decide? 372.

NOTES OF ARBITER, how far available in defining limits of submission, 66 *seq.*; in reducing or defending award, 66, 67; or in explaining award, 250 note [2], 259; notes may be varied by arbiter from time to time, 67, 259, 210 *seq.*; effect of referring to them in award, 67, 259, 343; arbiter is not bound to issue notes of opinion, 171; but

NOTES OF ARBITER.
generally advisable to do so, 171; notes are never final, and may be varied by arbiter at his discretion, 210 *seq.*; how far notes available in proof of *res gesta* under submission, 343 *seq.*

OATH, *de fideli*; *see* Appx. XVI. Note.
OATH OF PARTY; how far proves verbal submission or award, 56; when taken in a submission which expires, it may be used in after-process, 349.
OATH OF WITNESS; *see* Appx. XIII.
OBLIGATION TO IMPLEMENT AWARD; its import at common law, 21; excludes review on merits, 21; though arbiter errs in judgment, 22; but loses force if arbiter not impartial, 25, 26; loses force also if arbiter exceeds powers, 26; or if a party-submitter fraudulently imposes on arbiter, 27.
OBLIGATIONS, IMPLIED, OF ARBITER; breach of, fatal to award, 38.
Obreptio, by agent of party-submitter, may free opposite party from award, 28.
ODDMAN; formerly required by statute in all arbitrations, 371, 372.
OFFICE OF ARBITER; *see* Arbiter.
OFFICIAL LIQUIDATORS, their powers as to submission, 114, 115.
Ope exceptionis; what defences against action on award, may be so stated, 361.
OPINION OF COUNSEL; when equivalent to award, 46, 47; does it require an award stamp? 368, 369.
ORDONNANCE, ROYAL (1673), 7.
OVERSEER, has no power to bind his employer in a submission, without special authority, 120.
OVERSMAN, submission empowering him and any one of arbiters to decide, 50; case of appeal to, where only one arbiter, 51; what if ancillary submission-clause in a contract makes *no provision for oversman*, though arbiters should differ, 93, 94, 335 note; oversman contracts important obligations towards parties, 97; cannot be appointed by arbiter labouring under personal disqualification, 138; nature of oversman's office, 138, 235 *seq.*; oversman is a *sole arbiter*, 138; affected by same disqualifications as arbiters, 138; powers and duties, same, 142; power of prorogation conferred on, 182 *seq.*; *see* Prorogation; oversman may be *named in submission*, or by arbiters duly empowered, 187; advantage of naming in submission, 187; if *arbiters name*, they should do so *at outset*, 187; he is not to be selected by event of a toss by arbiters, 188; if oversman decline to accept, arbiters apparently may name another, 184; his acceptance should be ascertained before nominating him, 188; may be appointed by parties, if arbiters cannot agree to name, 189; nomination, at outset of submission, does not devolve submission on oversman, 189, 196; only after arbiters have *disagreed*, competent for them to devolve, 189, 190; but oversman and arbiters may arrange to sit together at proof, hearing, etc., 191; effect of *want of devolution*, and assumed character of oversman, 191; submission under which no minute of devolution is required, 191; how far is minute of devolution necessary before oversman can act? 192 *seq.*; what evidence necessary of arbiters' disagreement before oversman can act, 192; should always be a signed minute by arbiters, narrating their disagreement in opinion, 196; different from case of three co-arbiters, 196; effect of nomination of oversman after arbiters have disagreed, 197; what if nomination only made after oversman has inspected subject in dispute, 198; effect of *incomplete devolution* on oversman, 199; devolution renders arbiters *functi*, 200; oversman's prorogation can only keep up submission so far as devolved on himself, 184, 238; general powers and duties of oversman, 235 *seq.*; award of oversman must narrate that arbiters have disagreed, 245, 341; but if it falsely allege that the arbiters had differed, the falsehood is probable *pro ut de jure*, 341, 342; oversman may recall appointment of clerk of submission at pleasure, 293, 294. *See* Appx. III. Note; XXII.; XXIII.

PANDECTS; title on arbitration, 6.
PAROL EVIDENCE; how far admissible to prove submission, 52 *seq.*; incompetent to alter written submission, 340; *see* Proof; Verbal Submission.
PART-AWARD, OR PARTIAL AWARD, 262; *see* Award.
PARTIAL REDUCTION OF AWARD, 248; *see* Excess in Award.
PARTIALITY OF ARBITER; *see* Corruption Interest.
PARTICULAR CLAUSE; coupled with general, in mixed submission, 68; how construed, 68.
PARTIES-SUBMITTERS; come under certain implied obligations to each other, 26; breach of these by one party frees the other from the submission, 27; *who*

PARTIES-SUBMITTERS.
may be parties-submitters, 97; man, or unmarried woman, of full age, 98; how far husband may be, as to wife's heritage, 98; how far wife may be, 98 *seq.*; tutor, pupil, minor, curator, 102 *seq.*; factor *loco tutoris*, judicial factor, 111; executor, 112; *curator bonis*, 113; consignee, company, 113; trustee, 114; liquidator, 114; heir of entail, 115; assignee, 116; mandatary, 118; corporation, 120.

PARTNER OF COMPANY cannot bind company by a submission without consent of other partners, 113; *see* Company.

PARTNERSHIP; ancillary submission-clause in contract of, 70; not extended to extraordinary disputes, though between partners, 70; *see* Company.

PARTY may be arbiter in his own cause, if opposite party desires, 137; has right to be present at every diet of proof, 154 *seq.*; should be present at inspection of grounds, etc., 156; may waive objection to irregularity in leading proof, etc., 159; sequestration of party-submitter does not cause fall of submission, 114; *see* Sequestration; death of party causes fall of submission, 299; *see* Hearing of Parties.

PEERAGE, RIGHT TO, not a question which can be submitted, 123.

PENALTY IN SUBMISSION, arbiter's power over, 233; effect of excess in award as to penalty, 233; effect of penalty to enforce contract, 233; not a substitute for non-implement, 233; effect of penalty in award decerning for money payment, 234; in award decerning *ad factum prestandum*, 234; suggestion as to possible further use of penalties, 235; *see* Appx. XXXI.

PENALTY, on adhibiting stamp to unstamped submission, 365; *see* Stamp.

PERAMBULATION OF GROUNDS by arbiter, how far it enables him to dispense with other evidence as to value, 149 *seq.*; when evidence is admissible of *res gesta* at perambulation, 340.

PERSONAL EXCEPTION; *see* Exception.

PETITION, INCIDENTAL, BY ARBITER; when competent, on account of personal imputations on himself, in pending reduction of award, 337.

PLEADINGS OF PARTIES; how far they supply defect in prorogation of submission, 323 *seq.*; *see* Homologation; how far available as proof of *res gesta* under a submission, 346; or in construing submission or award, 62, 69, 346, 347; or in a subsequent process between same parties, 349. *See* Procedure in Submission.

POTHIER; Traité du Contrat de Soc., 7.

POWERS OF ARBITER; so far as express, may vary in any particular submission, 139; powers essential to his office, impliedly granted by parties, 139; powers correlative with his duties, 139; *see* Arbiter.

PRESCRIPTION, LONG NEGATIVE, special claim of debt in submission elides, 305; but general submission will not elide it if debt not specially claimed, 306; what if the prescription (whatever its class) has fully run before submission entered into, 307.

PRESCRIPTION, SEXENNIAL, effect of submission in eliding this prescription, 312.

PRESCRIPTION, TRIENNIAL, applies to account of clerk of submission, 294; how far does special claim of debt in submission elide this prescription? 307 *seq.*, 312.

PROCEDURE IN SUBMISSION; arbiter's power in regulating, 38, 39; large discretion, 172, 174, 140, 141; may examine parties personally if he sees fit, 165; not bound to delay procedure until a party consults counsel, 170; if he allows hearing to one party, must equally allow it to the other, 170; outline of a common form of process, 172; making up record, 173; important object of this form of procedure, 173; at what stage proof should be allowed, 173; should hearing be allowed before proof? 173; after proof, hearing on whole cause, 174; flexible form of process in arbitration, 174; limits of arbiter's power over form of procedure, 175; similar to his power over hearing, 175, 176. *See* Appx. VII. *seq.*

PROCESS, FORM OF, IN ARBITRATION; *see* Procedure. When legal process may be submitted; *see* Action; Judicial Reference.

PROGRESSIVE DUTY; *see* Stamp.

PROOF, effect of one-sided, 38 *seq.*; arbiter's duty as to proof, 41, 42; leading a proof, one great means of enabling arbiter to perform his duties, 140; implied power of arbiter regarding proof, 140, 141; large *discretionary power* in dealing with proof, 142; not obliged to admit reference to oath, 142; powers in admitting or rejecting evidence, 143, 144; in what circumstances rejection of proof will be fatal, 144, 145; in general, arbiter should freely admit all material evidence, 145, 146; arbiter may refuse to allow

PROOF.
proof which he considers *unnecessary*, 146, 147, 149; may often find proof unnecessary after inspection of premises, etc., 148; or personal observation of facts, 148; has *inherent power* as regards necessary proof, 150; submission-clause in articles of roup, 150; or in ancillary submission clause in railway contract, etc., 151.

Partial and one-sided proof inadmissible, 152, 153; party complaining must not himself have been in fault, 153; arbiter may reject all proof held *irrelevant*, 154; at proof, both parties must be present, or at least have received due *notice*, 154, 162; party may waive or forfeit right to lead proof, 155; arbiter's alleged want of care not relevant objection, 156; any limits imposed by submission must be observed, 159; what if proof led in absence of both parties, 159; how far may arbiter exclude law agents while he takes proof, 159; or refuse to have proof taken down by clerk, 159; may conduct examination himself, 160.

Can arbiter take proof on commission without express power? 160 *seq.*; indications of practice as to this, 161; prudent to insert express power in submission, where it is intended to be used, 162; generally desirable to afford full scope to parties to lead proof, 162; *irregularity* in taking proof cured by homologation, 321, 331; *see* Homologation; what if witnesses have not been sworn, 331, 334, 335.

Parol proof of arbiters' difference of opinion, how far admissible, 339; parol admissible in reduction of award on head of fraud, 337; some elements of proof peculiar to arbitration, 337, 338; how far evidence of arbiters and clerk admissible, 338 *seq.*; how far other parol proof admissible, 339 *seq.*; proof by *arbiters' oaths* to contradict their signed statement rejected in a suspension, 341; incompetent to prove arbiters' difference of opinion by parol where that fact was not narrated in oversman's award, 341; competent to prove, *pro ut de jure*, that an award falsely alleged that the arbiters had differed, 341; not competent by parol to support an award which was improbative when delivered, 342; proof by *arbiter's notes*, 343; arbiter's oath ineffectual to qualify a delivered disposition which was, *ex facie*, absolute, 342 note [3]; proof by *minutes of procedure* under a submission, 346, 352; proof by *pleadings of parties*, 346, 347; proof led in submission, how far available in challenge of award, 347; subsequent use of proof led in an expired submission, 348 *seq.*

How witnesses and havers are cited before an arbiter, 353 *seq.*; by what compulsitor can haver be made to produce a document, 354 *seq.*; what if witnesses reside in England, 356, 357; *see* Arbiter; Hearing; Sealed Deposition; Appx. XI. *seq.*

PROROGATION OF SUBMISSION; prolongs its duration, 177; must be timefully executed, 177; not requisite in ancillary submission, 177; requires express power in arbiter, 177; parties themselves may prorogate at any time, 177; form of prorogation, 178; need not be probative, but must be dated and signed, 178; *see* Appx. XX.; need not be intimated to parties, 178, 180; effect of usual *blanks* in clause of *prorogation*, 178, 179; computation of "year and day," 179; homologation of parties may cure defective prorogation, 180, 323 *seq.*; *see* Homologation; can one act of prorogation extend beyond *a year?* 181; same power of prorogation usually bestowed on oversman as on arbiters, 181, 182; submission presumably to be so construed, 182, 183; power of prorogation held imported into an ancillary submission from a principal, 183 note; power of *prorogation* is *ancillary* to deciding matters submitted, 184; prorogation by oversman can only keep up submission so far as devolved on himself, 184, 237; prorogation is not included in act of mere devolution, 198; prorogation by arbiters needs no stamp, 366; what if prorogation be by parties, 366; power of prorogation in submission partly of a statutory character, 386.

PUBLIC INTEREST; as to crime or social status, etc., cannot be competently submitted, 121 *seq.*

PUBLIC UNDERTAKING, promoters of; *see* Statutory Arbitration; Appx. XXVIII.

PUPIL, how far can he be party to submission? 102; *see* Tutor; pupil may challenge award on minority and lesion, 102; limits of the plea of minority and lesion, 103, 105; how far pupil *utitur jure communi*, 104, 105; *see* Minor; on reaching puberty, not subject, summarily, to diligence upon award against tutor, 360.

RAILWAYS; compulsory arbitration affecting them; *see* Statutory Arbitration, 374 *seq.* Appx. XXVII. *seq.*

RAILWAYS CLAUSES (SCOTLAND) ACT; *see* Statutory Arbitration; *see* Appx. XXIX.

Rationes decidendi; seldom beneficial in award, 259.

RECOMPENSE OF ARBITER; *see* Remuneration.

RECORD IN SUBMISSION, form of making up, 173; in many cases not required, 174; *see* Appx. IX.

RECORD, award put on; same as delivered, 210, 211, 213.

REDUCTION-IMPROBATION of decree of adjudication; how far it affects award, which had previously sustained said decree, 332.

REDUCTION OF AWARD, under Act of Regulations, 34 *seq.*, 327 *seq.*; at common law, 35, 36, 37, 332 *seq.*; of colourable award, 36; how far arbiter's notes available in, 66; *see* Notes of Arbiter; grounds of reduction of award, 327 *seq.*; when arbiter should be called as a defender, 337; proof admissible in reduction, 337 *seq.*; *see* Proof.

REFEREE named by statute, his powers, 391.

REFEREE, JUDICIAL; *see* Judicial Reference.

REFEREES, under submission-clause in coal-lease, 89 *seq.*; their procedure in taking proof, where coal-pit inaccessible, 333 *seq.*; *see* Agreement to Submit.

REFERENCE IN AWARDS, to notes or other documents, seldom desirable, 258; effect of referring to notes in award, 343.

REFERENCE JUDICIAL; *see* Judicial Reference.

REFERENCE TO OATH; *see* Oath of Party.

REGISTRATION OF SUBMISSION, formerly competent against an arbiter refusing to perform his office, 203.

REGISTRATION OF AWARD, consent to, founds diligence upon award, 357 *seq.*; consent must apply to award as well as submission, 358; must it apply expressly to prorogations and devolution, 360, 361; must consent be adhibited at outset of submission, 358; refusal by the Court, in special circumstances, to enforce registration, 363.

REGULATIONS; *see* Act of Regulations.

Rei interventus, cures informality in award, 240, 241, 327; *see* Homologation.

RELATIONSHIP to one of parties, how far it disqualifies arbiter, 134.

RELIEF of fee paid to judicial referee, 281, 316; of fee paid to arbiter, 316; of fee paid to clerk of submission, 293; *see* Judicial Referee; Clerk.

RELIEF; in action of, how far can evidence in expired submission be founded on? 351, 352.

REMIT TO MEN OF SKILL, arbiter's power to make, 224 *seq.*; remit in legal process, if done with consent of parties, may be substantially a judicial reference, 273; *see* Judicial Reference; remuneration of men of skill, 226 *seq.*; *see* Men of Skill; Appx. II. 3.

REMUNERATION OF ARBITER, not legally due, 312; unless stipulated for before commencement of submission, 313; but always due in good conscience, 312; cannot be decerned for in award, 313, 316, 328; effect of bargain as to remuneration pending submission, 314 *seq.*, 329; effect of verbal agreement for remuneration prior to submission, 315; remuneration of *judicial referee*, 281; relief of fee paid to judicial referee, 281, 316; relief of fee paid to arbiter, 316; parties before submitting, might bind themselves in mutual relief, for remuneration to arbiter, 318.

REMUNERATION OF CLERK TO SUBMISSION, 292; of men of skill employed by arbiter, 226.

RENUNCIATION OF OFFICE, not competent to arbiter at pleasure, 201 *seq.*; what is sufficient cause for renunciation, 205 *seq.*; either party may insist on arbiter's performing his office, 207; what compulsitors available, 208 *seq.*

Repugnantia between findings in award, effect of, 252; *see* Award.

RESERVATION IN AWARD, tends to raise plea of non-exhaustion of submission, 222; party who solicits reservation, barred from afterwards founding objection upon it, 222; *see* Submission; reservation often hazardous, 253; what if arbitral power be reserved after close of submission, 253; *see* Arbiter; Award.

Res gesta of submission, how far probable by arbiters and clerk, 338 *seq.*, 341; or by other parol evidence, 339 *seq.*; by arbiter's notes, 343 *seq.*; by minutes of procedure, 346; by written pleadings, 347.

REVOCATION of interim-award or part-award, how far competent, 263 *seq.*; of submission or judicial reference; *see* Submission; Judicial Reference.

ROAD ACT (GENERAL); how far is its limitation of right of action elided by submission? 310.

ROMANS, arbitration amongst, 5.

ROUP; submission-clause in articles of, 72, 73, 74 notes; implies power in arbiter to call for any necessary proof, 150.

RUTHERFURD, LORD, promoted arbitration procedure, 14; *see* Appx. XXX.

SALE, SUBMISSION-CLAUSE IN CONTRACT OF, 72; if it be to fix a price, agreement is good, though arbiters not named, 87.

SAVINGS BANK ACT, exempts arbitration procedure from stamp-duty, 370.

SEALED DEPOSITION, to lie *in retentis*; arbiter's duty regarding it, 156 note [2]; *see* Proof.

SEQUESTRATION OF PARTY-SUBMITTER, does not cause fall of submission, 114, 300; notice requisite to trustee, 114; terms of award, where bankrupt has been discharged under composition contract, 301; resolution of creditors to submit all questions, *per aversionem*, recalled by Court, 125 note [3].

SEQUESTRATION OF ARBITER, 301.

SERVANT, OR OVERSEER, requires express powers to bind his master by a submission, 120.

SEXENNIAL PRESCRIPTION; effect of submission in eliding, 312.

SISTING PARTIES in submission; *see* Appx. XXIV., XXV.

SKILL, MEN OF, 224; *see* Remit.

SLAVES, now unknown in Scotland; formerly disqualified to be arbiters, 127 note.

STAMP; not required on minute of judicial reference, 269, 369; or on award or report by judicial referee, 369; *see* Judicial Reference; how far stamps requisite on arbitration procedure, 364 *seq.*; on contract of submission having no clause of registration, 364; on submission having said clause, 364; on submission constituted by series of letters, 365; what if parties-submitters have separate interests, 365; on what conditions stamp may be adhibited to an unstamped submission, 365; no stamp on prorogation by arbiters, or on devolution, 366; what if prorogation be by parties, 366, 367; stamp on award, 368; progressive duty abolished, 368; is stamp requisite on Opinion given by Counsel on joint-memorial? 368, 369; does appraisement-stamp ever come in place of award-stamp? 369, 370; when stamp is necessary on foreign award, 370 note [3]; statutory exemptions from stamp-duty, 370.

STATUS, SOCIAL; legitimacy, etc.; not question competent to be submitted to arbitration, 123.

STATUTES REFERRED TO IN TREATISE,—
1426, c. 87, p. 371, 372.
1469, c. 28, p. 306.
1474, c. 54, p. 306.

STATUTES REFERRED TO IN TREATISE.
1594, c. 216, p. 134.
1617, c. 12, p. 302.
1633, c. 14, 15, 16, 17, 18, 19, p. 12.
1681, c. 13, p. 134.
1693, c. 26, p. 3.
1693, c. 27, p. 3.
9 & 10 Will. III., c. 15, pp. 8, 134.
12 Geo. III., c. 72, p. 50.
33 Geo. III., c. 54, p. 393.
46 Geo III., c. 43, p. 369.
54 Geo. III., c. 137, p. 114.
55 Geo. III., c. 184, p. 364.
1 & 2 Geo. IV., c. 55, p. 366.
5 Geo. IV., c. 41, pp. 269, 370.
5 Geo. IV., c. 96, pp. 10, 370, 374.
3 & 4 Will. IV., c. 42, p. 9, 29, 59, 302.
5 & 6 Will. IV., c. 70, p. 10.
7 Will. IV., and 1 Vict., c. 67, p. 10.
1 & 2 Vict., c. 98, p. 393.
2 & 3 Vict., c. 41, p. 114.
6 & 7 Vict., c. 82, p. 356.
7 & 8 Vict., c. 83, p. 370.
7 & 8 Vict., c. 85, p. 393.
8 & 9 Vict., c. 17, pp. 374, 378, 385. Appx. XXVII.
8 & 9 Vict., c. 18, p. 378. Appx. XXVIII.
8 & 9 Vict., c. 19, pp. 187, 227, 292, 374, 375, 376, 377, 385, 391. Appendix XXIX.
8 & 9 Vict., c. 33, p. 374, 378, 385, 392, 394.
13 & 14 Vict., c. 36, p. 14. Appx. XXX.
13 & 14 Vict., c. 97, pp. 365, 368.
17 & 18 Vict., c. 125, pp. 9, 380.
18 & 19 Vict., c. 63, p. 393.
19 & 20 Vict., c. 46, p. 10.
19 & 20 Vict., c. 79, pp. 114, 370.
20 & 21 Vict., c. 14, p. 115.
20 & 21 Vict., c. 78, p. 115.
22 & 23 Vict., c. 59, pp. 353, 374, 394.
23 Vict., c. 15, pp. 364, 365.
23 & 24 Vict., c. 58, p. 393.
23 & 24 Vict., c. 106, p. 374.
23 & 24 Vict., c. 111, p. 365.
25 & 26 Vict., c. 89, pp. 115, 374.
31 & 32 Vict., c. 100, p. 359.
31 & 32 Vict., c. 119, p. 374.
33 & 34 Vict., c. 97, pp. 365, 367, 368.
33 & 34 Vict., c. 99, pp. 364, 365.
35 & 36 Vict., c. 46, pp. 86, 374.
37 & 38 Vict., c. 40, pp. 10, 374.
37 & 38 Vict., c. 42, pp. 374, 393.
38 & 39 Vict., c. 60, pp. 374, 393.
39 & 40 Vict., c. 45, p. 374.
39 & 40 Vict., c. 52, p. 374.
See Statutory Arbitration; Appendix XXVII. *seq.*

STATUTORY ARBITRATION, 374 *seq.*; heir of entail, liferenter, etc., enabled to

STATUTORY ARBITRATION.
become parties to, 374; *rules of statutory procedure*, 375; *see* Appendix XXVII. *seq.*; as to non-revocation of submission, 375; failure to appoint one of arbiters, 375; death, etc., of an arbiter, 376; appointment of oversman, 376; death, etc., of sole arbiter, 376; refusal, etc., of one of arbiters to act, 376; duration of submission before arbiters, 376; powers of arbiters as to proof, etc., 376, 377; as to expenses, 377; remuneration of arbiters, 377; arbiter's lien over award, in England, 377; how statutory award to be executed, 377; on what grounds reducible, 377; duration of submission, 378; some statutory rules beneficial, 378; case where party fails to name an arbiter, 378 *seq.*; where arbiter delays to act, 381 *seq.*; where brief delay occurs to name arbiter, 381; where party dies, 381; early nomination of oversman, 382; effect of departure from statutory rules, 382; what if submission only *statutory in part*, 383; conversion into common law submission, 390; effect of acts of *homologation* as regards a purely statutory submission, 327; or as regards a submission, in part adopting statutory provisions, 327; if statutory submission prove abortive, parties may resort to jury, 391; in what circumstances *jury trial* precluded, 391; what class of questions competent under statutory arbitration, 391; statutory arbitration for determining remuneration payable for railway conveyance of mails, 393; or fitness of private engine for being used on railway, 394; or as to purchase-price of railway by Government, 394; for settling differences between Railway Companies, 394; for questions under Master and Workman Act, 9, 394; *see* Statute (obsolete) prohibiting an even number of arbiters in any submission, 371. *See* Appendix XXVII. *seq.*

STATUTORY EXEMPTIONS of arbitration procedure from stamp-duty; examples of, 370.

STATUTORY REFEREE, powers of, 391.

STYLES OF SUBMISSION; three ordinary classes of, 59; *see* Submission; Appendix I. *seq.*

STYLES OF SUBMISSION PROCEDURE; *see* Appendix VII. *seq.*

SUBMISSION; nature and object of contract at common law, 19; intends to exclude courts of law, 20; and to abide by judgment of private party, 21, 30.

Implied conditions of contract, 19; subjects contained in submission are thereby excluded from action in Court, 20; submission, a good preliminary defence, 20; no implied condition that the arbiter shall not err in judgment, 22; implied condition that arbiter shall act with honesty and impartiality, 22.

Contract not revocable at will of party, 28.

Colourable submission, not valid, 36.

Constitution of contract, 44; should be by probative writ, 44, 45; but informal submission may be validated by homologation or *rei interventus*, 45.

Accession of party to a current submission, 48, 49.

Various modes formerly of constituting submission, 49; blank formerly left for award, 49; bond of submission, 49; bond and release placed in arbiter's hands, 49; bills mutually deposited with arbiter, 50.

Common forms of submission, 50, 51; what if no power given to choose oversman, 51, 335 note; submission to three co-arbiters, 51; power to oversman and either of two arbiters to decide, 51.

Verbal submission, 52; probable by parol or by oath of party, 52; former class only valid in matters of small importance, 52-55; verbal submissions have no support from Act of Regulations, 52; but have force of contract at common law, 52; should therefore be free from review on merits, 52; as to disputed marches, 55, 56; *see* 45 note [4]; in what cases verbal submissions may be proved by oath of party, 56; verbal submission as to heritage, followed by *rei interventus*, 56, 57; verbal submission, an unadvisable procedure, 57.

Construction of submission, 57; limits of submission should be well defined, 57; arbiter's judgment on this point open to review, 58; Erskine favourable to liberal construction, 58; not to be loosely enlarged, 58; no technical style requisite for submission, 59; *three common styles*, special, general, and mixed, 59; *see* Appendix I. *seq.*; even general submission only includes disputes already existing, 60; and not sopited, 60; what if parties dispute before arbiter as to limits of general submission, 60, 61; some presumptive limitations of general words, 61; how to state distinctly the limits of a general submission, 62; though submission be general, arbiter is only bound to decide matters duly brought

SUBMISSION.
before him, 62; where no claims have been lodged by parties, Court has to discover limits of submission from less satisfactory sources, 63; what these sources are, 64; cases illustrative, 63 *seq.*; use of arbiter's notes in such a question, 66 *seq.*; limits should be defined by claims, or otherwise, 62, 67; *mixed* or general-special submission, 68; contains general clause coupled with particular, 68; rule for construing it, 69; should have its limits defined by claims, or otherwise, 70.

Ancillary submission, 46; easily called into activity, 46; its co-endurance with primary contract, 47; implied powers of arbiter, 47; scope and construction of ancillary submission, 70; qualified by connection with primary contract, 70 *seq.*; clause of submission in rules of coursing meeting, 73 note; in contract of sale, submitting disputes as to "quality and delivery" of certain article, 73; in articles of roup, submitting disputes as to, 72, and notes on 72, 73, 74; in mineral lease or in railway contract, 74, 75 note; natural construction of ancillary submission as to *duration*, 75, 78 note; needs no prorogation, 177, 304; awards made during currency of primary contract do not close this submission, 304; it does not fall by death, disqualification, or miscarriage of arbiter, 305; *its proper function executorial*, 75, 77 note; how far intended to embrace nice questions of *law*, 76; how far include questions of *damages*, 76, 77 note, 82; may be made broad enough to include all such questions, if parties choose, 77, 82; how far is ancillary submission in lease effectual against singular successor in lands, 80, 81; if requisite for liquidation of obligations, etc., in primary contract, valid, though arbiters not named (*see* Agreement to Submit); where no provision made for naming oversman, though arbiters disagree, 93, 94, 335 note; submission to two arbiters should always provide for naming oversman, 94; if this omitted in ancillary submission, can Court give remedy? 94, 95, 335 note.

Who may be parties to a submission, 97 *seq.*

Submission may include any subject over which the parties have full power of disposal, 120; may include a legal process, 124, 280, 281; cannot deal with any public interest, *ex. gr.*, in questions of crime, 121, 122; or status, etc., 122; or agreements *contra bonos mores*, 123; how far it affects heirs of entail, 115, 123; may embrace future differences, 125.

If submission imposes limits on arbiter's power to lead proof, these must be observed, 159.

Submission presumed to confer same power of *prorogation* upon oversman, as upon arbiters, if words admit construction, 182, 183.

Substantially a *new submission*, when parties name an oversman, in consequence of arbiters failing to agree upon oversman, 189.

Submission formerly contained obligation, subjecting arbiter to *summary diligence*, 202; style of submission now altered, 203; still supports action against arbiter to perform his office, 203.

Clerk of submission is servant of arbiters, 210; *see* Clerk.

At close of submission, award left in hands of clerk, presumed delivered, 212, 213.

Exhaustion of submission requisite in Roman law, where no express power to pronounce part-awards, 214; and by old law of Scotland, 214; if award decides claims of one side only, objection of non-exhaustion fatal, 214, 215; opinions of Erskine, Bankton, and Kilkerran, 215; opinions, *obiter*, in case of Lyle, 216; grounds of plea of non-exhaustion of submission, 217 *seq.*; does the plea apply to a general submission? 220; does it apply where all the claims are on one side? 221; advisable to give express power to pronounce part-awards or interim-awards, when so intended, 222; such power often expedient, 222; presumption that award was meant to be exhaustive, 222.

Reservations in award tend to raise plea of non-exhaustion, 222; party who solicits the reservation, barred from founding objection upon it, 222.

Submission with usual blanks of style, *endures* for one year without prorogation, 294, 295; but duration may be regulated at pleasure of parties, 295; expires by final award, 295; date from which year begins to run, 295; date of completion of contract of submission, 296, 297; where no determinate time in submission, and no blanks of style, submission may subsist forty years, 297; clauses of duration in submission, 295, 298; submission falls by death of party, unless otherwise provided, 299; but not by bankruptcy of party, 300;

SUBMISSION.
notice to trustee, 300; what if cautioner of party die, 299, 302; submission falls by death of arbiter, 300; would submission fall by *marriage of female party?* 100, 107 note; or by death of tutor, party-submitter? 106; or by pupil's death or reaching puberty? 106; or by death of minor? 301; or of his curator? 302; or by minor reaching majority? 111; effect of party's bankruptcy, 114; submission may be closed *quandocunque* by mutual consent of parties, 302; but not at pleasure of one party, 302; submission may expire by arbiter's lawful renunciation of office, 303 (*see* Arbiter's Renunciation, 201 *seq.*); what if arbiter greatly misconducts himself, 303; or plainly goes beyond the submission, 303; what if interdict against him be pending, 303, and note [4].

Defective acceptance of submission may be cured by *homologation*, 320; so may defective prorogation, 322; or want of signature to submission, 326; *see* Homologation.

Submission of claim, its effect in eliding *prescription*, 305, *seq.*; or in eliding statutory limitation of right of action, 309.

Minutes of procedure in submission; how far available in proof of *res gesta*, 346; proof led in expired submission, how far available in after-process, 348, *seq.*; Appx. VII. *seq.*; *see* Clerk to Submission.

SUBMISSION (at common law), statutory submission converted into, 388; *see* Statutory Arbitration; Appx. I. *seq.*

SUBMISSIONS (*quasi* public) to Charles I., 11.

SUNDAY; award executed on, 244.

SUSPENSION; cautioner in,—effect of judicial reference of process, 284; proof by arbiters, in contradiction of their signed minute, rejected when tendered in suspension, 341; what objections to award may be competently stated in suspension, 361.

TECHNICAL STYLE not required for submission, or submission procedure, 59; *see* Appx. of ordinary examples of style.

TESTING CLAUSE OF AWARD, 243; *see* Award; Appx. I.

TRANSACTION, may be challenged by minor for enorm lesion, 105; power to transact tantamount to power to submit, 121 note.

TRIENNIAL PRESCRIPTION; *see* Prescription.

TRUSTEE, effect of personal decerniture against, for expenses, 229.

TRUSTEE UNDER PRIVATE DEED, power to submit depends on terms of deed, 115.

TRUSTEE IN SEQUESTRATION, with concurrence of commissioners, may submit questions respecting bankrupt estate, 114; trustee of bankrupt party-submitter must receive notice of subsisting submission, 114; or subsequent procedure reducible by him, 114.

TUTOR, may submit question as to pupil's moveable estate, 102; tutor, the party, 102; can tutor submit claim affecting heritage? 105; submission must be signed by quorum of tutors, where more than one, 106; effect of death of one of quorum, 106; effect of death of pupil, 106; effect of pupil's reaching puberty, 106 *seq.*; notice of submission should be given to pupil reaching puberty, and to his curators, 109; award against tutor founds action (but not summary diligence) against pupil reaching puberty, 360.

TUTORY TO A PUPIL, not a subject which can competently be submitted, 123, note [1].

Ultra vires, effect of excess in award, 248; as to penalty, 233.

UMPIRE, or Oversman; *see* Oversman; Devolution.

UNDELIVERED AWARD, revocable by arbiter, 210 *seq.*; should be altered by arbiter, though fully signed and tested, if his opinion changes, 213; co-arbiter may recall his concurrence in undelivered award, 213.

UNDERTAKING, PUBLIC; *see* Statutory Arbitration; Appx. XXVII. *seq.*

UNMARRIED WOMAN, of full age, may be a party to a submission, 98.

USE AND POSSESSION; proof of, may sometimes aid in explaining an award, 251.

VALUATION; no general rule that hearing may be dispensed with by arbiter, who, as man of skill, inspects subjects to be valued, 166 note; in some circumstances, no hearing required, 166, 167; valuation of tenant's stocking under ancillary submission; *see* Agreement to Submit.

VARIATIONS OF STYLE, in ordinary submissions. *See* Appx. II., III. Note.

VERBAL SUBMISSION; *see* Submission.

WAKENING OF PROCESS which has been judicially referred, 282; *see* Note to Appx. V.

WESTMINSTER HALL, Judges in; how affected formerly towards arbitration, 32 note.

WIFE, how far may she become party to a submission? 98 *seq.*; or be an arbiter? 128.

WITNESS; arbiter's control over examination of, 152 *seq.*; what if witness not sworn by arbiter, 331, 333, 334; how far deposition of deceased witness, taken in expired submission, is available in after-process between the same parties, 350, 351; how witness is cited before arbiter, 353 *seq.*; how compelled to answer, 354 *seq.*; what if he reside in England, 356; *see* Appx. XII. *seq.*; Proof.

WOD, or furious persons, can they be arbiters? 127 note, 128.

WOMAN; in former times not allowed to be arbiter, 127 note; this rule no longer absolute, as to unmarried women, 128; can married woman be arbiter? 128; unmarried woman of full age may be a party-submitter, 98.

WRITINGS, production of, in submission, when to be made, 173; *see* Haver; Appx. XII. *seq.*

YEAR, OR YEAR AND DAY, how computed in duration of submission, 295.

PRINTED BY T. AND A. CONSTABLE, PRINTERS TO HER MAJESTY,
AT THE EDINBURGH UNIVERSITY PRESS.

LBC LBG VJ12
Treatise on the law of arbitra
Stanford Law Library
3 6105 044 571 268